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HAROLD B. WILLEY

In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. 602

ASHLAND OIL & REFINING COMPANY,
Petitioner,

v.

CARLTON BEAL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

W. B. BROWDER, JR.,
P. O. Box 670,
Midland, Texas,
Attorney for Petitioner.

Of Counsel:

STUBBEMAN, MCRAE & SEALY,
Midland, Texas.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

ASHLAND OIL & REFINING COMPANY petitions this Court for a Writ of Certiorari to review a judgment and opinion of the United States Court of Appeals for the Fifth Circuit, and respectfully shows the Court:

(A) OPINIONS OF THE COURTS BELOW

The opinion in the United States Court of Appeals for the Fifth Circuit, not yet reported (Rec. 605-619), is attached as Appendix A. The judgment is attached as Appendix B.

The judgment and decree of the District Court for the Western District of Texas, unreported, is dated June 22, 1954. (Rec. 580-587.) There was no opinion written by the Judge of the District Court.

(B) JURISDICTION

(i) The opinion and decree of the United States Court of Appeals sought to be reviewed is dated July 22, 1955, and the opinion was filed and judgment entered on that date. (Rec. 605-619, 620.)

On July 30, 1955, one of the judges of the Court of Appeals granted the Motion for Extension of Time to file a Motion for Rehearing and the time for filing such motion was extended to and including September 12, 1955. (Rec. 621.) On September 3, 1955, a Petition for Rehearing was filed (Rec. 622-628), and with permission of the Court arguments were filed by both parties. (Rec. 629-684, 685-732.)

(ii) On October 12, 1955, an order was entered by the Court of Appeals denying the Petititon for Rehearing. (Rec. 733.)

(iii) The statutory provisions believed to confer on this Court jurisdiction to review the opinion and decrees in

question are *Subdivision (1) of Section 1254 of Title 28 of the United States Code* and *Subdivision (b) of Section 1 of Rule 19 of the Supreme Court Rules.* It is believed that these provisions are applicable and confer jurisdiction on this Court because the Court of Appeals has applied a Texas statute *(Article 3995)* and decided important questions of Texas land law in a way in conflict with decisions of the appellate courts of Texas; the Court has decided an important question of the substantive law of Texas (the *Parol Evidence Rule)* in a way in conflict with the decisions of the courts of Texas; and further, it is believed that the Court of Appeals has sanctioned such a departure by the District Court from *Federal Rules of Civil Procedure (Rule 49)* as to call for an exercise of this Court's power of supervision.

(C) QUESTIONS PRESENTED FOR REVIEW

The questions herein presented for review by this Court may be grouped into five general categories, (i) the effect of the *Statute of Frauds of the State of Texas (Article 3995, Revised Civil Statutes of 1925)* upon contracts affecting interests in land and the amendment or modification of such agreements by prior, oral agreements, claimed subsequent agreements not signed by the party to be charged therewith, and estoppel; (ii) the effect of the *Parol Evidence Rule* and a written contract as merging and cancelling all prior conversations and negotiations; (iii) the effect of the failure to answer a self-serving letter asserting an agreement between the parties; (iv) the validity and effect of an agreement to later agree to make

a contract; and (v) the effect of the District Court's incorrect and improper general charge and instructions to the jury upon a judgment rendered upon the findings of the jury on a Special Verdict. For the purpose of showing the questions raised in this connection, they are more lucidly framed as follows:

(i) Statute of Frauds

(a) Will a party to a written contract within the *Statute of Frauds of the State of Texas*, containing express contractual provisions for monthly payment of a share of the costs to be incurred in future drilling and operations of a lease on Texas lands and for withholding of any sums coming into the hands of the creditor until such costs of drilling and operation are paid, be deprived of such benefits and estopped to deny a claimed modification and new and different agreement by the failure to answer a subsequent self-serving letter from the other party stating that it had been agreed that a prior, oral agreement would be reduced to writing and would provide that all such costs should be discharged out of production without any personal liability on the part of the debtor?

(b) Where the portions of the written contract affected by the claimed subsequent modification are required to be in writing under the Statute of Frauds of the State of Texas, will such provisions be amended or superseded by a claimed new oral agreement eliminating the lien and privilege of retention of money on hand and providing a different method and means of discharging the indebtedness?

(c) Will a written agreement be amended or superseded by a claimed subsequent oral agreement or estoppel, where the matters included in the claimed modification are themselves required to be in writing under the Statute of Frauds of the State of Texas?

(d) Did the Court of Appeals err in using estoppel to raise an enforceable agreement on the part of Ashland to draft a contract to finance Beal without any personal liability on the part of Beal, where the prior written contract between the parties provided directly to the contrary, and the only evidence in support of such promise to draft a new financing agreement was the oral negotiations and conversations had prior to the execution of the written agreement and a self-serving letter sent by Beal to Ashland subsequent to the written agreement?

(ii) Parol Evidence Rule

(a) Did both the District Court and the Court of Appeals err in considering and giving evidentiary weight to oral conversations had and letters written preceding the final, written agreement between the parties?

(b) Is the Parol Evidence Rule, as applied by the courts of Texas, to be disregarded so that conversations, letters and negotiations prior to the written contract are to be admitted in evidence to raise a duty to speak when a letter outlining contradictory rights and privileges is written subsequent to the execution of the written agreement?

(c) Did the Court of Appeals err in its application of the Parol Evidence Rule of the Texas courts when it raised an estoppel out of failure of Ashland to answer a letter from Beal asserting Beal's understanding of an agreement to finance him without personal liability, which promises, if any, were oral and made prior to the written contract?

(iii) Failure to Answer a Letter

(a) Is a party estopped to deny an agreement outlined in a letter which he has received but to which he has made no answer?

(b) Is a self-serving, unanswered letter admissible in evidence to support a party's claim that an agreement had been made?

(iv) Incomplete Contract

(a) Is an agreement to agree a binding, enforceable contract?

(b) Is there any legally enforceable or binding contract between two parties where there is an agreement to later agree, or where there is a demand by one party upon the other that an agreement be drawn up, where it has been proven that both parties understood and agreed that there was to be no binding contract between them until it was written up and executed by both of them?

(v) The Charge of the Court

(a) Is weight and effect to be given to the jury's findings on a Special Verdict under *Rule 49*, where the Court

has given incorrect and improper instructions to the jury and ordered that the jury make all of its findings based upon and in accordance with such improper, incorrect and highly prejudicial instructions?

(b) Did the District Court commit reversible error in charging the jury that they must find for Beal and against Ashland if they found that Ashland orally agreed with Beal that it would carry him free of personal liability; that if they found that the actual agreement of the parties was different from that set out in the Operating Agreement, then their verdict would be for Beal; and that if they found that the Operating Agreement was delivered on condition they would find for Beal?

(D) THE STATUTES INVOLVED IN THE CASE

Article 3995, Revised Civil Statutes of 1925, is the *Statute of Frauds of the State of Texas.*

This statute is as follows:

> "Article 3995. Writing required.
>
> "No action shall be brought in any court in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereunto lawfully authorized:
>
> "1. To charge any executor or administrator upon any promise to answer any debt or damage due from his testator or intestate, out of his own estate; or,
>
> "2. To charge any person upon a promise to answer for the debt, default or miscarriage of another; or,

"3. To charge any person upon any agreement made upon consideration of marriage; or,

"4. Upon any contract for the sale of real estate or the lease thereof for a longer term than one year; or,

"5. Upon any agreement which is not to be performed within the space of one year from the making thereof."

Rule 49, Federal Rules of Civil Procedure, provides that the court may require a jury to return a special verdict in the form of special written findings upon each issue of fact.

Subdivision (a) of Rule 49 is, in part, as follows:

"The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue."

Subdivision (b) of Rule 49 provides that the court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact, and in this Rule it is directed that the court give instructions as follows:

"The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict."

(E) STATEMENT OF THE CASE

This suit was brought in the United States District Court for the Western District of Texas by the Respondent, Carlton Beal, a citizen of California, against the Peti-

tioner, Ashland Oil & Refining Company, a Kentucky corporation, to recover a sum of money in excess of Fifty Thousand Dollars ($50,000.00) which Ashland had received and retained from sale of Beal's interest in oil produced from a Beal-Russell No. 1 well and 14 other producing leases located in Texas, with Beal alleging in his complaint that, pursuant to Division Orders, Ashland had received such money from pipe line companies taking the oil and gas from leases in which Beal owned an interest, and that Ashland had failed and refused to pay the sums of money so received over to him. (Record 1-6.)

Ashland defended, claiming that it had rightfully withheld all such amounts under the terms and provisions (particularly paragraphs 3, 8 and 10) of a written Operating Agreement between the parties of April 8, 1951, and Ashland filed its Counter-Claim by way of set-off for one-fourth of the costs and expenses incurred by Ashland in drilling, developing and operating a 237.33 acres Elser lease in Upton County, Texas, owned by Beal and Ashland in the proportions of one-fourth and three-fourths, respectively. (Rec. 8-17.)

The written Operating Agreement pleaded by Ashland is a Texas contract, affecting Texas land, set up in a Federal court in Texas. Admittedly it was executed by both parties and under it Ashland operated the Elser lease. It contained provisions in numbered paragraphs, in part, as follows:

> 1. Ashland was designated Operator of the joint premises.

3. The parties agreed jointly to explore, develop and operate the lands for the production of oil and gas, with all costs, expenses and liabilities to be shared and borne by them in proportion to their ownership.

5. Operator was obligated to make a good faith effort to maintain the lease in full force and effect.

8. Operator was to furnish Beal with monthly itemized statements of costs and expenses, and Beal promised to pay his proportionate share of all such costs and expenses within fifteen days after receipt of each such statement, with the provision that if Beal failed to make payment of any such amount when due, the unpaid amount should bear interest at the rate of 6% per annum until paid.

10. In order to secure Operator for expenditures made by it, the parties agreed that Ashland should have a first and prior lien upon all the rights and estate of Beal in the joint operation area, and that in the event Beal should fail or refuse to pay any sum due under the Operating Agreement when due, Operator (Ashland) might apply in payment or part payment thereof or as an offset thereto any sums in the hands of Operator belonging to Beal.

12. Each party was obligated to participate in the cost of drilling any well specifically described in such Agreement or required by any express or implied covenant under the lease.

22. It was stated that the Agreement should remain in force and effect, and the property should not be subject to partition, so long as the lease remained in force.

25. If either party desired to sell his interest in the property, the other party was given a preferential right to purchase the same. (Rec. 18-33; 35-52.)

This Operating Agreement is attached as Appendix C.

Beal answered the Counter-Claim, and admitted that he executed the Operating Agreement which bears date of April 8, 1951, but defended on the grounds, first, that the written contract was executed with a prior or contemporaneous oral agreement and understanding that another written instrument would be executed covering payment of Beal's share of the cost of production and that no such additional instrument had been prepared by Ashland and executed by the parties, and that, therefore, there was no contract between Ashland and Beal obligating Beal to pay any part of the development or operating costs of the Elser lease; second, that Ashland was estopped to claim that the provisions of the Operating Agreement, dealing with payment for the cost of development and providing for withholding of Beal's monies from other leases, were agreed to by the parties or that such provisions had any force or effect; and, third, in the alternative, that there was a mutual mistake between the parties as to what the agreement was concerning Beal's obligation to pay for the development and operation of his interest and concerning the security to be given therefor by Beal to Ashland. Beal prayed that Ashland take nothing by its Cross-Action, for reformation of the Operating Agreement, and for the relief prayed for in his Original Complaint. (Rec. 61-73.)

Beal made a timely demand for trial by jury (Rec. 7), and the case was tried to the jury.

Over objections and exceptions of Ashland (Rec. 171-172, 427; 191-203, 217-218, 530-532), considerable testimony of oral conversations and letters preceding the writ-

ten agreement was admitted in evidence by the Court. Letters written by Beal to Ashland subsequent to execution of the written contract, which were unanswered by Ashland, were also admitted in evidence, over the objections and exceptions of Ashland. (Rec. 191-194, 202, 217, 218-223, 530-532.)

Further, over the objections and exceptions of Ashland (Rec. 553-569), the Court instructed the jury that if they found that Ashland had orally agreed that it would carry Beal free of personal liability, the jury would find for Beal and against Ashland; that if they found that the written agreement was delivered on condition that there would be no personal liability on the part of Beal, they would find for Beal; that if they found that the actual agreement of the parties was different from that set out in the written contract, then their verdict would be for Beal, and other like instructions. (Rec. 520-529.) The Court then followed that general charge and those special instructions with a form for a Special Verdict, and the jury made its findings. (Rec. 570-577.)

The jury found that Ashland had orally agreed with Beal that it would carry his interest without any personal liability on his part; that the written instruments were not all of the agreement between the parties; that the written Operating Agreement was delivered by Beal on condition that his interest was to be carried free of any personal liability and such agreement would be reduced to writing at a later date and signed by the parties; that the actual agreement of the parties controlling the payment of the

costs of operation was otherwise than set out in the written contract; that Ashland had led Beal to believe that it had agreed otherwise than was set out in the written agreement. However, the jury went further and found, (a) that it was the intention of the parties that before there was any other contract than the Operating Agreement, the terms thereof should be reduced to writing and signed by the parties, and (b) that Ashland gave Beal notice of its intention to drill the wells on the Elser lease and Beal in writing agreed to participate in the drilling and operating costs of each such well. (Rec. 570-574.)

By reason of the jury findings that the parties had only agreed to later agree to some kind of different arrangement and that Beal had agreed to participate in the drilling and operating costs, Ashland thought that it had secured a jury verdict and filed a motion for judgment. (Rec. 574-577.)

The District Court entered judgment for Beal that he recover from Ashland the sum of Sixty-Two Thousand Four Hundred Seventy-Three Dollars and Thirty-Four Cents ($62,473.34) and ordered that the Operating Agreement of April 8, 1951, be reformed by deletion of the obligatory provisions of paragraph 8, all of paragraph 9, and all of paragraph 10, and with addition of a new paragraph providing that the Operator agrees to advance the full cost of developing and operating the premises and to look solely to Beal's 25% of the production for the repayment of his share of the costs. (Rec. 580-587.)

An appeal was timely taken from the judgment of the District Court.

The Court of Appeals held and declared, first, that Ashland had given Beal notice of its intention to drill the wells and Beal had discussed the drilling of such wells in a manner which showed that he considered himself a working partner therein and consented and agreed to such operation; second, that there was no substantial evidence to sustain the contention of Beal that the written Operating Agreement never became effective because delivered on a condition which was not fulfilled; and, third, that there was no mutual mistake and the written agreement merged all prior verbal negotiations and understandings.

However, after deciding the material and controlling questions in favor of Ashland, the Court of Appeals went further and found that on July 19, 1951, after the execution and delivery of the written agreement, Beal had written Ashland, (1) advising that (a) it was Beal's desire that Ashland finance his working interest in the wells to be drilled on the Elser lease, with the company to retain the proceeds from oil and gas production until the costs, plus 4½% interest per annum, were recovered, and (b) the company was to have additional collateral and security by pledge of the future income from Beal's working interest in another Beal well if a dry hole was drilled on the joint property, and (2) asking Ashland to prepare a financing agreement accordingly. Although this letter was not accepted or answered by Ashland, the Court resurrected the oral conversations and negotiations had prior to

the execution of the Operating Agreement, held that Ashland had promised to draft an agreement to finance Beal but had failed to do so, and held that Ashland, having kept silent after it received the letter of July 19, 1951, was estopped to deny that the terms outlined in that letter constituted the financing agreement between the parties. (Rec. 605-619; Appendix A.)

The judgment of the appellate court ordered the judgment of the District Court modified so as to eliminate that part reforming the written Operating Agreement and decreed that Ashland was estopped to deny that its agreement to finance Beal was in accordance with Beal's letter of July 19, 1951. The Court of Appeals then went further and affirmed that part of the District Court's judgment for Beal and against Ashland for Sixty-Two Thousand Four Hundred Seventy-Three Dollars and Thirty-Four Cents ($62,473.34), the money which had come in the hands of Ashland by reason of the oil runs from the other leases in which Beal owned interests. (Rec. 620.)

The Court of Appeals denied Ashland's Petition for Rehearing. (Rec. 733.)

(F) REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(i)
Statute of Frauds

The Court of Appeals has decided an important State question in a way in conflict with applicable decisions of the appellate courts of Texas in that it has held that con-

tractual provisions of consideration in a written agreement affecting real estate, and which provisions are themselves within the *Statute of Frauds of the State of Texas, Article 3995, Revised Civil Statutes of 1925*, may be amended and superseded by a subsequent agreement not signed by the party to be charged therewith or by estoppel to deny a claim of such a subsequent agreement.

The Court has held in conflict with applicable State law that particular provisions of a written agreement concerning real estate may be amended and, in fact, superseded by a subsequent, oral modification, or estoppel, even though the modification provisions are themselves required by the *Statute of Frauds* to be in writing and signed by the party to be charged therewith.

The Court of Appeals recognized as a valid, legal contract, the Operating Agreement between the parties of April 8, 1951. This agreement obligated the parties to jointly explore, develop and operate the premises for production of oil and gas, with all costs, expenses and liabilities to be shared and borne by them in the proportion of Ashland, 75%, and Beal, 25%. It was specifically provided that Beal should pay his proportionate share of such necessary expenditures within fifteen days after receipt of monthly statements. Further and quite important, one paragraph of this agreement particularly granted and provided additional protection for Ashland by giving Ashland a first and prior lien upon all of the rights, title and interest and estate of Beal in the jointly operated lease and on all oil, gas and other minerals produced therefrom, and,

in addition thereto, conferred upon Ashland the privilege of obtaining recoupment by retaining any oil runs or money received by Ashland from oil taken by Ashland or others from other leases owned by Beal. This provision created a lien on real estate. It gave Ashland the contractual privilege to hold any oil runs (money received from oil produced) which came into Ashland's hands belonging to Beal to assure at least some payment upon the tremendously large expenses incurred in operating the lease. This provision was itself a contract affecting realty and governing disposition of proceeds to be derived from production of oil and gas.

And yet the Court held that these contractual rights were abrogated by a subsequent agreement not signed by Ashland.

Of equal importance is the fact that the two matters encompassed in Beal's letter of July 19, 1951, are themselves contractual provisions involving real estate and within the bar of the Statute. The first contractual provision mentioned in this letter from Beal to Ashland is the recitation that for the purpose of financing Beal's 25% working interest in the wells to be drilled on the Elser lease, Ashland was to retain 100% of the proceeds from oil and gas production (that is, oil and gas thereafter produced and taken out of the ground) until such costs were recovered. This is itself a contract for the taking and use of oil and gas not then severed from the land and to be thereafter (it was hoped) produced, and was a contract for the sale or lease of realty.

The second part of this modification is the claimed agreement that Ashland would accept a pledge, by way of "additional collateral" of the income from Beal's 25% working interest in an entirely different well and property, known as the Beal-Russell No. 1 well. In the letter, Beal states that Ashland's policy was to require collateral and to satisfy such policy he and Ashland had agreed that he would pledge this interest (a working interest) in an oil and gas lease on lands in Texas. This apparently essential portion of the new agreement raised by the Court is itself a contract on or for real estate.

The *Statute of Frauds* of the State of Texas is the local law. It provides that no action shall be brought in any court upon any contract for the sale of real estate or the lease thereof for a longer term than one year, unless the promise or agreement upon which such action shall be brought shall be in writing and signed by the party to be charged therewith. *Section 4, Article 3995, Revised Civil Statutes of 1925.*

It is settled by the decisions of the appellate courts of Texas that everything the lessor or lessee or the assignee of either of them takes or is to receive from the oil or gas to be taken from the land, is itself an interest in real estate.

In *Sheffield v. Hogg, 124 Tex. 290, 77 S. W. 2d 1021,* the Supreme Court of Texas said it was finally settled in *W. T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S. W. 2d 27,* that the ordinary oil lease operates to vest

the lessee with a determinable fee in oil and gas in place, and that it makes no difference "whether the oil is retained by the lessor as oil and gas, readily convertible into cash on the market, or whether the lessee is given a power to sell all of the oil and gas, always accounting for a fixed royalty portion to the lessor."

In *Veal v. Thomason, 138 Tex. 341, 159 S. W. 2d 472,* the Supreme Court said that mineral royalty affecting land in this State "granted or reserved, and however payable—whether in the specific product (oil) or in money measured by the value of the product, is an interest in the land covered by the contract."

In *Tennant v. Dunn, 130 Tex. 285, 110 S. W. 2d 53,* the Supreme Court said that it is settled "that royalties, whether payable in money or in kind, issuing out of the ordinary oil and gas leasehold estate, * * * are interests in land; and hence not subject to parol sale, but have the protection of the Statute of Frauds, the statutes regulating conveyances and mortgages of real estate, and the statutes requiring the record of instruments affecting title to or liens on land."

In *Lockhart v. Williams, 144 Tex. 553, 192 S. W. 2d 146,* the Texas Supreme Court held that the right to receive oil payment of a per cent of a certain sum of money from the oil as and when produced and sold from a well to be thereafter drilled was an interest in land.

In both *Carr v. Stringer, 171 S. W. 2d 920, no writ history,* and *Frost v. Standard Oil Co., 107 S. W. 2d 1037, no*

writ history, it was held that an overriding royalty is realty.

In *Sheppard v. Stanolind Oil & Gas Co., Tex. Civ. App., 125 S. W. 2d 643*, approved by the Supreme Court by unconditional refusal of the application for writ of error, the leases provided for payment to the State of Texas of stipulated sums of money out of one-sixth of five-sixths of the first oil and gas, if, as, and when produced from the leased area. The question directly to be decided was whether the oil payments thus reserved to the State were interest in the minerals and land. The Court said that, "For all practical purposes, and viewed in the light of every practical consideration, the interest of the State in the production of one-sixth of five-sixths of the oil, up to the full amount of the stated sums, is essentially and actually in nowise different from its interest under its retained royalty," and the interest was held to be realty.

In *Danciger Oil & Refining Co. of Texas v. Christian, Tex. Civ. App., 109 S. W. 2d 980*, with application for writ of error dismissed, the contract provided that the driller should be paid certain specified sums out of one-fourth of seven-eighths of the first oil or gas produced, saved and sold from the lease, as consideration for his services. The Court declared that the interest thus created was an interest in land.

A decision directly in point on this question is *Prince Bros. Drilling Co. v. Fuhrman Petroleum Corporation, Tex. Civ. App., 150 S. W. 2d 314*, with the opinion approved by the Supreme Court by unconditional refusal of

the application for writ of error. Prince Bros. agreed to drill certain wells for Fuhrman; the drilling contract provided that Prince Bros. was to be paid only from a fractional part of the oil produced. It was argued by Prince Bros. that the contract did not convey an interest in land and as such was not subject to ad valorem taxes. The Court discussed certain general rules, and then said in defining this amount of money to be paid out of production for the drilling of the well that it was "an interest in land," as follows:

> "But it is the nature of the interest held by defendant here that is a determinative element in this appeal. If an interest or estate defendant took in the minerals, it is limited by the provisions as to the realization of the amount due for drilling. It was established by the evidence that defendant had a right to realize the sum of $225,902.29. The terms of the assignments here, in our opinion, are basically the same as those considered in Tennant v. Dunn, 130 Tex. 285, 110 S. W. 2d 53. It was there held that the interest was an interest in land.
>
> "In our opinion the case of Sheffield Tax Collector v. Hogg, 124 Tex. 290, 77 S. W. 2d 1021, 80 S. W. 2d 741, applies here, and authoritatively and definitely establishes that the interest in question here is an interest in land and taxable as such. As to the question here involved there can be little difference between the nature of an interest reserved and an interest created by conveyance."

Another controlling decision of an appellate court of Texas is *American Liberty Oil Co. v. Texas, Tex. Civ. App., 197 S. W. 2d 381, app. for writ of er. ref., n. r. e.* The drilling contract provided that certain specified sums

should be paid for the drilling and operation of the wells, with such sums to be paid only out of 75% of all the oil and gas produced, saved and marketed from the wells. The appellant argued that the oil there mentioned was merely an oil payment and did not amount to an interest in land, that it was no more than a contract providing for the payment of money under certain circumstances. The Court held that this was an interest in land. The Court invited attention to "an interesting discussion of the question here presented in an article in Texas Law Review, Vol. XX, page 259, written by Mr. A. W. Walker, Jr.," and said:

> "So it seems to us, as it did to the court in Sheppard v. Stanolind Oil & Gas Co., supra, that there is no practical difference between a contract granting or reserving a fractional interest in the minerals until a certain sum of money has been paid therefrom, and a contract providing that a certain sum of money shall be paid from a specified fraction of minerals, if, as and when the minerals are produced. In either case, the beneficial interest held by the owner of the so-called oil payment amounts practically to the same thing, he receives the proceeds of sales of the fractional interest in the minerals until he collects the amount of his payment, if the production is sufficient to bring about that result."

In one of the latest cases, *LaRue v. Wiggins, Tex. Civ. App., 277 S. W. 2d 808, app. for writ of er. ref., n. r. e.*, a "carried interest" in an oil and gas lease was involved. Appellant contended that a verbal agreement concerning such carried interest was removed from the bar of the *Statute of Frauds* because such an interest was merely "a proportional interest in the net profits accruing to a par-

ticular firm or person from an oil and gas transaction." The Court stated, "We cannot agree with this contention," and then declared:

> "We are of the opinion that any present interest in the net profits, if any, to accrue to appellees in the future by reason of their ownership of oil and gas leases covering the 5,500 acre drilling block in controversy, constitutes and is an interest in real estate within the meaning of the Statute of Frauds and the Texas Trust Act."

This broad application of the *Texas Statute of Frauds* to all contracts concerning interests in production had under oil and gas leases is recognized in the opinion of Judge Hutcheson in *Fleming v. Campbell, 205 F. 2d 549.* Speaking of oil payments of a definite duration and also of mineral interests, Judge Hutcheson said:

> "In the first place, both interests exchanged were interests in land.
>
> "Both were interests in minerals in place. Both were therefore interests in land, interests not in personal but in real property, in short, real rights."

The discussion of this question has been gone into rather thoroughly because the Respondent has argued on various occasions that this Operating Agreement of April 8, 1951, was itself not within the *Statute of Frauds* and that the proposed and claimed contractual provisions of Beal's letter to Ashland of July 19, 1951, were not within the *Statute of Frauds.* In fact, in his reply to the Petition for

Rehearing in the Court of Appeals, Respondent cited and argued certain language appearing in *Hager v. Stakes, 116 Tex. 453, 294 S. W. 835.*

As said in *Seidel v. Gully, 242 S. W. 2d 442:*

> "Although some early decisions by our Supreme Court appear to sustain appellant's contention, such decisions have been overruled.
>
> "The court (in Sheffield v. Hogg, 124 Tex. 290, 77 S. W. 2d 1021) expressly stated that language used in Hager v. Stakes, 116 Tex. 453, 294 S. W. 835, and Ehlinger v. Clark, 917 Tex. 547, 8 S. W. 2d 666, which could not be reconciled with the holdings in the Hogg case was disapproved."

The applicable local law concerning this question of modification by estoppel or claimed prior or subsequent oral agreement is fixed by the *Statute of Frauds* as construed and applied by the Supreme Court of Texas in *Robertson v. Melton, 115 S. W. 2d 624.* The Court there held that the doctrine of estoppel could not be invoked to make a new contract amending or modifying contractual provisions of a written agreement affecting land, required to be in writing and signed by the party to be charged therewith.

We believe that the case so completely controls the proper disposition of this litigation, that the pleadings and facts should be briefly reviewed.

The evidence showed that there was a written contract in which Melton agreed to convey to Robertson 1735 acres of land, and in exchange therefor Robertson agreed to convey to Melton eight lots. The 1735 acres of land was

subject to a first mortgage lien securing payment of $17,350.00 and a second lien securing payment of six notes. Melton agreed to secure a rearrangement of the second group of notes so that they could be paid in annual installments of $1,000.00 each. Melton secured rearrangement of the notes but he was not able to secure such rearrangement where they could be paid at $1,000.00 each. After execution of the written agreement, and finding that he could not secure the agreed upon rearrangement, Melton procured a letter from the holders of the notes addressed to Robertson advising that five of the notes could be paid in installments of $1,000.00 each, but that the sixth note would be for $1,866.64. This letter was signed by Melton and delivered to Robertson. Robertson held the letter and made no answer to it. Robertson did not merely remain silent; it was proven and the jury found that Robertson actually assented and agreed to the modification as outlined in the letter delivered him by Melton. Melton acted in reliance upon Robertson's acceptance of the letter and expended money and effort to comply with his part of the contract. It was even shown that Melton could have obtained the rearrangement of the notes within the exact terms of the original written agreement had he not been misled by Robertson's apparent acceptance of the new contract. In other words, Robertson stood ready to convey the eight lots to Melton, and Melton stood ready to convey Robertson the 1735 acres of land; the only hitch in the transaction was that Melton had agreed to secure the re-

arrangement of a group of notes in a certain manner, and he had secured such rearrangement in a slightly different manner.

Melton pleaded that the arrangement made for the extension of the notes constituted a substantial compliance with the terms of the original contract, and that if it was not such substantial compliance it was agreed to and accepted by Robertson personally; that such acceptance of the arrangement waived compliance with the terms of the original contract; and "that Robertson was estopped by his agreement to the arrangement."

The Court held that the contract was within the *Statute of Frauds*, and that the parties might not by a subsequent, oral agreement alter one or more of the terms thereof and "thus make a new contract resting partly in writing and partly in parol, the reason for the rule being that when such alteration is made, part of the contract has to be proven by parol evidence, and the contract is thus exposed to all the evils which the statute was intended to remedy." The Court said that the provision in the original contract, to the effect that the notes should be rearranged, which was to be treated as the consideration, was such consideration as itself came within the *Statute of Frauds*. The Court declared that the requirement for rearrangement of the notes "clearly contemplated, to make it regular and fully effective, the execution of a written instrument extending the notes and lien in compliance with Article 5520 to Article 5523 of the Revised Civil Statutes of 1925."

The Supreme Court of Texas here declared the local law of estoppel. The Court held:

> "*The facts alleged as estopping Robertson* are that he agreed to the modification *made by the letter*, led Melton to believe for many weeks that the contract would be consummated, and finally refused to execute a deed conveying the Wichita Falls property; and that Melton could have procured the rearrangement of the notes according to the original contract if Robertson had not agreed to the modification. These allegations are in substance that the defendant is estopped to plead the statute because the *plaintiff relied upon the defendant's oral agreement to the modification.* To permit a parol contract thus to be relieved from the operation of the statute of frauds would in effect annul the statute. Looking both to the pleadings and to the evidence, we find that the case, *in so far as the granting of relief from the statute of frauds is concerned, falls far short of the rule announced in Hooks v. Bridgewater, 111 Tex. 122, 229 S. W. 1114, 15 A. L. R. 216,* which has many times been approved and followed.
>
> "A wrong was done Melton by Robertson's breach of the contract. This occurs whenever a contract coming under the statute is breached. * * * The statute cannot be disregarded for the prevention of mere wrongs or to remedy possible losses. Hooks v. Bridgewater, 111 Tex. 122, 127, 128; 229 S. W. 1114, 15 A. L. R. 216."

In connection with the facts and pleading above outlined, the Supreme Court said that,

> "We do not find either in the pleadings or in the evidence any grounds for sustaining the contention of defendant in error that plaintiff in error is estopped from claiming the benefit of the statute of frauds."

In the case now up for review, the written agreement between the parties required Beal to make payment of the costs charged to his account within fifteen days after receipt of itemized statements showing such costs and expenses, with the unpaid amount to bear interest at the rate of 6% per annum. This written agreement went much further: It created liens on, and rights to, the production of oil and gas from the Elser lease and also from other wells and leases in which Beal owned interests. Paragraph 10 of the agreement granted Ashland a lien upon all the rights, title, interest and estate of Beal in the Elser lease, and also granted to Ashland the right and privilege of holding and retaining any sums of money which came into its hands by reason of subsequent production and taking of oil or gas from other leases in which Beal owned interests. The agreement as a whole and the provisions of paragraph 10 was a contract covering real estate just as was the agreement in the *Robertson v. Melton* case.

The letter sought to be used as a modification of the Operating Agreement, outlined two provisions, the first, that Ashland would finance Beal's interest in the wells to be drilled on the Elser lease and would retain 100% of the proceeds from the oil and gas which it was contemplated would be thereafter produced until such costs, plus 4½% interest per annum, were recovered, and the second, that Ashland would require additional collateral and Beal would pledge his income from his 25% working interest in another and entirely different well. The requirement for preparation of a financing agreement to include the obliga-

tion on the part of Ashland to finance Beal's 25% working interest in the wells on the Elser lease and Beal's contract that Ashland could own and hold the oil and gas thereafter produced until it received a certain amount of money, as well as the agreement that the so-called financing agreement would include a provision for mortgage or pledge of income from the working interest in another well, contemplated, to make it regular and fully effective, the execution of a written instrument granting such rights in future production under oil and gas leases. This is the same kind of agreement held to be within the *Statute* in *Robertson v. Melton.*

Kistler v. Latham, Tex. Com. App., 255 S. W. 983, cited with approval in *Robertson v. Melton*, was a *Statute of Frauds* case. It was claimed that subsequent to the execution of the written agreement there was an agreement to waive the provision of the contract against encumbrances on part of the property to be conveyed. One of the parties, Kistler, materially changed his position in reliance upon the agreement. The Court declared:

> "Expenditures of money upon the faith of a verbal contract or verbal modification of a written contract within the statute of fraud is not sufficient to take the contract out of the operation of the statute. We think this is the practically uniform holding of the courts in this and other states. If it were otherwise, the statute would seldom be of any practical value. Hooks v. Bridgewater, 111 Tex. 122, 229 S. W. 1114, 15 A. L. R. 216; Clegg v. Brannan, 111 Tex. 367, 234 S. W. 1076; Ward v. Etier (Tex. Com. App.), 251 S. W. 1028."

Epstein v. D & A Oppenheimer, Tex. Civ. App., 94 S. W. 2d 779, is also quoted with approval in *Robertson v. Melton.* The Court there said:

> "The rule seems to be well established that where, as in this case, the consideration for a contract is required by the statute of frauds to be in writing, and is so expressed, it cannot be modified by a subsequent parol agreement. * * * the alleged parol agreement was that in a prescribed contingency the installment payments were to be paid only if and when the rents from the property were sufficient to meet such payments and that appellee should extend the maturity of the principal to an indefinite and undetermined time in the future. If given effect the parol agreement would constitute an entirely new and different contract between the parties from that expressed in their solemn written covenant."

Robertson v. Melton is cited with approval and followed by the Supreme Court of Texas in *Taber v. Pettus Oil & Refining Co., 139 Tex. 395, 162 S. W. 2d 959.* This was a suit upon a written agreement to purchase oil and gas leases; the defendant interposed the defense of the *Statute of Frauds;* the plaintiff contended that the Statute was not applicable because the contract had been performed by him in reliance upon the claimed agreement. The plaintiff had drilled a well, and certainly, this was a considerable change of position at material loss. The Supreme Court said:

> "Moreover, the statute cannot be disregarded for the prevention of mere wrongs or to remedy possible losses. Robertson v. Melton, supra. Respondent drilled the well charged with knowledge that the law would not enforce its alleged contract with Taber, hence it

> acted at its own peril and we cannot now do violence to the law to relieve it of the consequences. In other words, the facts of this case do not constitute such a fraud on respondent as to warrant our disregarding the broad public policy declared in our Statute of Frauds."

It has even been argued by Respondent in the Court of Appeals that if it be held that the letter from Beal to Ashland of July 19, 1951, contained obligatory provisions within the *Statute of Frauds*, such provisions obligated Beal to sign the written agreement and the Statute is not applicable because Beal stands ready to execute and deliver the proper instruments. However, this is exactly the fact situation presented in the *Taber v. Pettus Oil & Refining Co.* case. There, Pettus sued Taber for a portion of the purchase price contracted for the assignment of a certain oil and gas lease. Under the written agreement, Pettus was to drill a well and when such well was drilled it was to furnish proof of such drilling, along with logs, and an assignment to Taber, and Taber was to pay $1,600.00 therefor. The facts showed and the Court found that respondent drilled the test well and then tendered Taber the instruments which it required to be furnished after the well had been drilled, along with an assignment. As shown by the Court, Taber paid $250.00 cash but refused to pay the balance of $1,350.00 due on the agreed purchase price. The Court said that such facts did "not show such performance or part performance as to remove the bar of the statute of frauds." In this connection, the Court declared:

> "Since the memorandum related to oil and gas in place, it was an agreement for a conveyance of real

estate under Art. 3995 (4), supra, and is governed by the rules of law applicable to such agreements. Smith v. Sorrelle, supra. It has long been held by this court that payment of the consideration, or a part of it, unaccompanied by possession of the land by the vendee and the making by him of valuable and permanent improvements thereon, does not render the contract enforceable. All the elements mentioned are indispensable. See Robertson v. Melton, 131 Tex. 325, 115 S. W. 2d 624, 118 A. L. R. 1505, and authorities there cited; 18 Tex. Digest, Frauds, Statute of, Key 129 (11)."

The rule of *Robertson v. Melton* is adopted and reaffirmed in the very late decision of the Supreme Court of Texas in *Garcia v. Karam, 276 S. W. 2d 255.* This is the latest expression on this important local question. The case is distinguishable on the facts, but the law there announced is that which is here argued by Petitioner.

The contract in this *Garcia* case provided that the consideration of $42,500.00 was to be paid, $20,000.00 cash, and $22,500.00 to be paid in monthly installments of $250.00 or more per month, with the original $20,000.00 to be paid in merchandise, etc., from stock at invoice. A modification of the contract was proven to the extent that defendant orally agreed to accept the stock of merchandise at a value of $20,000.00 without the necessity of taking an inventory. The Court held that inasmuch as neither the portion of the written contract affected by the subsequent modification nor the matter encompassed by the modification itself was required by the *Statute of Frauds* to be in writing, the oral modification was enforceable.

The Court said that in the *Robertson v. Melton* case, "it was correctly held that the consideration had been reduced to writing and such consideration being within the Statute of Frauds, it could not be modified by a subsequent parol agreement." Further, the Court commenced its announcement of the law and applied the rule as follows:

> *"If neither the portion of the written contract affected by the subsequent modification nor the matter encompassed by the modification itself is required by the Statute of Frauds to be in writing, then the oral modification will not render the contract unenforceable."*

This Operating Agreement of April 8, 1951, provided that, in order to secure Ashland for expenditures made by it for the benefit of the joint account, (a) Ashland should have and it was thereby granted a first and prior lien upon all of the rights, title and interest of Beal in the jointly operated lease and on all oil, gas and other minerals produced therefrom, and, in addition, (b) at any time in the future when Beal should be in arrears in payment of his proportionate part of the costs and expenses incurred, Ashland had the right and privilege to take and hold any sums which had come to it by reason of oil or gas produced and taken from other leases and to apply such runs in payment of Beal's part of the expenses. This itself is a contractual provision for securing payment of the consideration for Ashland's operating the premises and expending the necessary money therefor. Such consideration was reduced to writing, and being within the *Statute of Frauds*

it could not be modified by a subsequent agreement not signed by Ashland, the party sought to be charged therewith. *Garcia v. Karam*, supra.

Further, and shown to be just as important in the opinion in *Garcia v. Karam*, the letter used by the Court of Appeals to deprive Petitioner of its rights and privileges in and to oil runs and other production from oil and gas leases, itself contains two provisions which are within the *Statute of Frauds*. This letter from Beal to Ashland of July 19, 1951, first, would make an agreement that Ashland would finance Beal's 25% working interest in the wells to be drilled on the Elser lease, with the right and privilege to retain 100% of the proceeds from all oil and gas produced from such lease until a sum of money had been derived therefrom sufficient to pay all of such costs, plus 4½% interest per annum, and second, would make an agreement whereby Beal would grant and Ashland would accept a pledge or mortgage (presumably in writing) of all runs (or income from runs) from Beal's 25% working interest in other oil and gas properties and leases. The matters encompassed by the modification as made by the Court of Appeals are themselves within the law of the *Statute* as applied in *Garcia v. Karam*, supra.

It is respectfully submitted that the law of the State of Texas is made by the *Statute of Frauds, Article 3995*, and declared by the opinion of the Supreme Court in the *Robertson v. Melton* case, as reaffirmed in the case of *Garcia v. Karam*.

(ii)

Parol Evidence Rule

The Court of Appeals has decided an important state question in a way in conflict with applicable local laws, in that it has refused to apply the *Parol Evidence Rule* as recognized and applied by the Texas courts.

Refusing to apply the *Parol Evidence Rule* and failing to hold that all prior conversations and correspondence were merged in and cancelled by the written agreement, the Court considered and gave effect to claimed conversations and negotiations had between Ashland and Beal before the execution and delivery of the Operating Agreement of April 8, 1951. In violation of the *Parol Evidence Rule* as applied in Texas by Texas courts, the Court of Appeals declared that Ashland had "promised to draft the agreement to finance Beal" and it was upon this promise that the Court raised a duty to answer Beal's letter of July 19, 1951.

Beal was permitted to testify that there was a verbal understanding which Ashland was later to reduce to writing, under which Ashland was to finance Beal's share of the cost of development. This was the claim made by Beal in his letter of July 19, 1951. The witnesses for Ashland testified that there was no such understanding which went to the extent that Beal was to have no personal liability and that Ashland was to be repaid only out of the oil and gas produced from the Elser lease.

It is undisputed that the only evidence of any agreement discussed or had between the parties was in conversations or negotiations had BEFORE the execution and delivery of the written contract.

Petitioner thought that the Court of Appeals had surely approved its argument that the written contract was the best and all-controlling evidence of the agreement between the parties when the Court said that, "There could be no mistake as to the effect of the written agreement in merging all prior, verbal negotiations and understandings, for that is the law under which all parties must operate and which must certainly have been in fact understood by these parties who had vast business experience in large affairs." However, the Court did not follow this pronouncement to its logical end.

The Court discussed the prior negotiations and the jury findings that there was a prior understanding. Then the Court called attention to the fact that subsequent to the written agreement Beal had written certain self-serving letters to Ashland, stating that there were prior, oral negotiations, which letters were not answered. The Court even said that it would agree with Ashland that its failure to answer Beal's letters could not be treated as an admission "if Ashland were under no duty to reply." The discrepancy in the Court's opinion and judgment is that it, in effect, went back to the prior, oral negotiations, to hold that Ashland had "promised to draft the agreement to finance Beal."

This holding by the Court of Appeals is to the same effect as that consideration given the evidence of the prior negotiations by the District Court. The District Court permitted evidence of such prior negotiations and permitted that evidence to be heard by the jury. In fact, the trial court emphasized the testimony by instructing the jury that it might consider and even give controlling effect upon all of its findings to such evidence of prior, oral negotiations and understanding.

The *Parol Evidence Rule* as applied as a part of the substantive law of this State makes wholly inadmissible any proof of prior and inconsistent oral promises or agreements. The written contract governs the rights of the parties. *McCormick & Ray, Texas Law of Evidence, pages 747, et seq., Section 725, et seq.*

This local law is declared by the Supreme Court of Texas in *Denman v. Hall, 143 Tex. 633, 193 S. W. 2d 515.* The Court unequivocally holds that parol evidence cannot be received concerning prior oral negotiations or agreements. In this connection, the Court there declared:

> *"The rule is that parol evidence cannot be received to establish any oral condition relating to the contract if the condition is inconsistent with the terms of the written instrument.* 32 C. J. S., Evidence, §935, p. 859.
>
> "In general, extrinsic evidence cannot be introduced to contradict or vary the intention of the parties as set out in the written contract by showing the existence of a prior or contemporary oral understanding contrary to the terms of the written contract. Elliott on Contracts, Vol. 2, Sec. 1621, p. 929.

> "It is impracticable to review all the Texas decisions, but we think they uniformly recognize that *an oral contemporaneous condition cannot be proved if it is inconsistent with the terms of a written instrument* duly delivered to the party against whom the condition is sought to be invoked."

This is but a reiteration of the rule very early announced by the Supreme Court of Texas in *Milliken v. County of Callahan, 6 S. W. 681*, as follows:

> "The general rule is that where the written contract is clear and certain, it must be taken to express the will of the parties; and it is not proper to look elsewhere for their intention. Jones, Com. & Tr. Cont., §174. All preliminary negotiations, whether written or unwritten, which have led to the execution of the agreement, are deemed to have been absorbed and merged in it, and the writing must be taken as expressing the final views of the parties. 2 Whart. Cont., §643. It may be read in the light of surrounding circumstances to explain its meaning when obscure or uncertain, but not to contradict the meaning where it is perfectly plain."

This rule has been recognized by the Court of Appeals of the Fifth Circuit in *McCamy v. General Electric Supply Corp., 185 F. 2d 944*, in which it was stated that "proof of the prior and inconsistent oral agreements alleged was not admissible."

Further, this is a rule adopted from the Supreme Court of the United States, as shown in *James v. Doss, Tex. Civ. App., 184 S. W. 623*, where it is said:

> "The written contract is the best evidence of the intention of the parties to the agreement. All previous

negotiations and agreements are, as a rule, merged in the writing.

"When the writing is couched in such terms as to be plain and without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties was reduced to writing. Seitz v. Brewer, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837:

> "'To allow a party to lay the foundation for such parol evidence by oral testimony that only part of the agreement was reduced to writing, and then prove by parol the part omitted, would be to work in a circle, and to permit the very evil which the rule was designed to prevent.' Thompson v. Libby, 34 Minn. 374, 26 N. W. 1; Sunderland v. Hackney (Mo.), 181 S. W. 1192; Fuqua v. Pabst, etc., 36 S. W. 479."

The flaw in the opinion and decree of the Court of Appeals is that it recognizes this rule of local law as decided and applied by the courts of this State, but then in raising a duty on the part of Ashland to reply to the self-serving ex-parte letter from Beal, it in effect holds that the District Court did not err in permitting the introduction in evidence of such testimony and that the case, in part at least, is to be decided upon such evidence and the negotiations had before the parties put their agreement into a solemn written contract.

(iii)

Failure to Answer a Letter

The Court of Appeals has decided an important question of local law in a way in conflict with the law of this State as decided and announced by the local courts, in that it has

held that Ashland is estopped to deny an agreement outlined in the uninvited, unaccepted and unanswered letter of Beal to Ashland of July 19, 1951.

The Texas courts have consistently held that, one, evidence of a party's self-serving statements in his own letters are inadmissible, and two, that evidence of a person's failure to answer or deny self-serving statements in such letters made or written by the opposite party is not admissible as an admission.

We believe that the law of Texas is stated in *Curtsinger v. McGown, Tex. Civ. App., 149 S. W. 303, no writ of error history*, in which the Court held that letters written by one party to the other were inadmissible, "because they were mere self-serving declarations by appellee, and were not of such character as reasonably to impose upon appellant the duty to reply thereto and refute the claims made therein." The Court here explained its position by saying:

> "The failure to reply to a written communication has not the same significance as an admission as a failure to reply to an oral communication. Thus, in Viele v. McLean, supra, the following is quoted with approval from Talcott v. Harris, 93 N. Y. 567:
>
> > " 'While a party may be called upon in many cases to speak where a charge is made against him, and in failing to do so may be considered as acquiescing in its correctness, *his omission to answer a written allegation*, whether by affidavits or otherwise, *cannot be regarded as an admission of the correctness thereof, and that it is true in all respects.* Reasons may exist why he may choose and has a right to remain silent, and to vindicate himself at some future period and on some more opportune occasion'."

The same holding is made in *Shambaugh v. Willard, Tex. Civ. App., 45 S. W. 2d 1105, no writ of error history.* Plaintiff sued to recover damages for breach of an alleged oral contract, claimed to have been made at a meeting of the parties on June 25. Over objection, plaintiff introduced in evidence a letter from him to the defendant of June 27, reciting the agreement as plaintiff understood it. The letter was not answered by the defendant. This Texas court held that such letter was wholly inadmissible, and said:

> "This letter was not answered by defendant. It was neither alleged nor proven that defendant agreed to the terms of the letter. The petition declares upon an oral contract made June 25th, two days before the date of the letter. The statements contained in the letter were self-serving upon the vital issues in the case and it was improperly admitted in evidence because of its self-serving nature. Leach & Co. v. Pierson, 275 U. S. 120, 48 S. Ct. 57, 72 L. Ed. 194, 55 A. L. R. 457; Columbia Malting Co. v. Clausen-Flanagan Corporation (C. C. A.), 3 F. 2d 547."

The law of Texas is in large part based upon the same reasoning as stated by Mr. Justice Holmes for the Supreme Court of the United States in *Leach & Co. v. Peirson, 275 U. S. 120, 48 S. Ct. 57, 72 L. Ed. 194, 55 A. L. R. 457.* The plaintiff sued upon an alleged agreement to repurchase certain bonds. The agreement was claimed to have been made in 1920. The plaintiff wrote to the defendant on May 9, 1921, and in this letter it was stated that, "it was agreed by Mr. Mather that at any time I so desired you would take them (the bonds) off my hands at cost 98. I have need of some money and will avail myself of this

privilege. When shall I deliver them to you?" The plaintiff got a verdict and judgment, and the judgment was affirmed by the Court of Appeals. On a suggestion of conflict between the opinions of the Courts of Appeal and of the failure to conform to the rule of evidence of Pennsylvania, a writ of certiorari was granted. Mr. Justice Holmes said:

> "A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts. He no more can impose a duty to answer a charge than he can impose a duty to pay by sending goods. Therefore, a failure to answer such adverse assertions in the absence of further circumstances making an answer requisite or natural has no effect as an admission."

It is respectfully submitted that the reasoning in the *Leach & Co. v. Peirson* case is the argument of this Petitioner, and a writ of certiorari should be granted to review the decree of the Court of Appeals which so disregarded this rule of local and universal law.

(iv)

Incomplete Contract

The Court of Appeals has decided an important question of local law in a way in conflict with the applicable law of Texas as announced in the decisions of the appellate courts of this State in that it has raised and made a completed contract for Ashland to finance Beal without personal lia-

bility on the part of Beal, denying Ashland the privilege of withholding oil runs coming into its hands to assure payment of such indebtedness, where the testimony of Respondent shows and the jury has found that it was the intention of the parties that before there was any such binding contract, the terms thereof should be reduced to writing and signed by the parties.

In the trial of the case, Beal testified that papers were to be drawn up for a carried interest (Rec. 391); that there were details which he would want worked out and agreed upon and set out in the agreement (Rec. 395-396, 397, 400, 401.) Beal's representative and employee, Carpenter, testified that there was a conversation prior to the execution of the written agreement regarding the financing of Beal's one-fourth interest, and that he had several conversations with Ashland's representative concerning the papers to be written up to provide for the financial arrangements. (Rec. 427-429.)

In reply to Special Issue No. 7 submitted to them for their special verdict, the jury found that it was the intention of the parties that before there was any contract concerning such financing arrangement, that the terms thereof should be reduced to writing and signed by the parties. (Rec. 572-582.)

The very letter which the Court of Appeals uses to raise a contract, that is, the letter from Beal to Ashland of July 19, 1951, calls upon Ashland to "prepare the financing agreement."

The opinion of the Texas court in *Rosebud Oil & Cotton Co. v. Merchants & Planters Oil Co., 248 S. W. 116, no writ of error history,* is directly in point.

In that *Rosebud Oil & Cotton Co.* case, plaintiff sued to recover damages for breach of a contract for sale of two tanks of cottonseed oil. The defendant denied that there had been any final or complete contract. The Court declared:

> "Although the terms of the contract may all be agreed upon, still, if the parties make it a condition to the existence of a contract that the terms agreed upon be reduced to writing, and signed by them, there is no contract until this is done."

To the same effect is the latter case of *Pegues v. Dilworth, 104 S. W. 2d 558, aff'd 132 S. W. 2d 582.* Here the Court said:

> "* * * where they had agreed, as a part of their agreement, that the oral agreement should be embodied in a formal writing and signed by them before a binding agreement is consummated, the writing would control. *But where there is such agreement there is no binding agreement until this has been done.* Joske v. Pleasants, 15 Tex. Civ. App. 433, 39 S. W. 586 (writ refused); 10 Tex. Jur., pp. 54, 55, 56."

An even later case is *Gilbert v. Texas Company, 218 S. W. 2d 906, er. ref., n. r. e.* In this case (p. 942) the Court declared:

> "In the case of Mississippi, etc., Steamship Co. v. Swift, 86 M. 248, 29 A. 1063, 1066, 41 Am. St. Rep. 545, Rossiter v. Miller, supra, and many other Eng-

lish cases are cited and examined, and the modern rule was expressed in the language of that opinion. 'It is quite clear that, after all, the question is merely one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. *If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument, and attested by signatures, then he will not be bound until the signatures are affixed.*"

In other words, in Texas courts an agreement to make an agreement is simply no agreement at all—and the Court of Appeals erred in refusing to so hold.

(v)

The Charge of the Court

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision, because the District Court's judgment, rendered upon a Special Verdict of the jury, was affirmed, although the District Court had wholly failed to give to the jury such explanation and instruction concerning the matter submitted to them as necessary to correctly set forth the applicable law.

Beal claimed and testified that in February, 1951, he had a telephone conversation with the representative of Ashland, and that it was then agreed between them that

Ashland would carry Beal for his 25% interest in the Elser lease, with all the drilling and production costs to be paid for out of oil produced from the property and without any personal liability to Beal whatsoever. (Beal, Rec. 175, 178-179, 185.) Both Beal and his representative, Carpenter, testified that early in March, 1951, there was a conference between the representatives of the two parties, and that then the Ashland representative said that Ashland was going to carry Beal without any personal liability on his part. (Carpenter, Rec. 426-427, 430.)

The District Court instructed the jury that Beal's claim for the recovery of the money for which he sued was based on the contention that Ashland had agreed to carry Beal's one-fourth working interest (Rec. 521), and that, "Now, if you find from a preponderance of the evidence that Ashland Oil & Refining Company orally agreed with Carlton Beal that Ashland would carry the one-fourth working interest of Beal in the Ashland-Beal-Russell-Elser lease, then you will find for the Plaintiff Carlton Beal on this suit against Ashland Oil & Refining Company * * *." (Rec. 524.)

As said by the Court of Appeals, there may have been some verbal understanding concerning Beal's personal liability, but that was not enough to establish mutual mistake or make for a holding in favor of Beal. There was no mistake as to the actual terms of the written agreement, and the written agreement merged all prior, verbal negotiations. (Rec. 613-614.)

Beal claimed that although he executed the Operating Agreement and sent it to Ashland on April 11, 1951, and signed additional copies of it on May 17, 1951, the Operating Agreement was delivered to Ashland "on the condition that I (Beal) get the other papers." (Beal, Rec. 183, 187-188, 223-224, 383.)

The District Court instructed the jury that if they found that the Operating Agreement was delivered by Beal on condition that his working interest in the lease was to be carried without personal liability, "then they would find for the Plaintiff, Carlton Beal, on his suit against Ashland Oil & Refining Company for the amount of payments withheld from him from production other than from the six wells on the Elser lease * * *." (Rec. 525.)

As said by the Court of Appeals, "There was no substantial evidence, we think, to sustain the contention that the written Operating Agreement never became effective because delivered on a written condition which has not been fulfilled." And as further explained by the Court, "Clearly, we think, that was not Beal's intention for he has himself throughout depended on the Operating Agreement in other respects." (Rec. 609-613.)

Petitioner timely objected and took its exceptions to the Court's charge and instructions. (Rec. 529, 553-569.)

Under *Rule 49, Federal Rules of Civil Procedure*, the Court is authorized to submit a case to the jury on a Special Verdict in the form of a special written finding upon each issue of fact. The Court did so submit the case to the jury. (Rec. 570-574.)

Where the case is so submitted to the jury, the Court must give the jury such explanation and instructions as may be necessary to enable the jury to make its findings. This cannot mean that the Court is authorized to incorrectly and improperly instruct the jury and to thus improvidently control each and every one of the jury's findings.

Certainly, it is wholly useless to submit the case to the jury where the jury's findings are set by the Court's instructions based upon an incorrect interpretation and application of the law applicable to the case. In other words, submission of questions and the giving of an improper instruction, is to illegally control the jury's answer to each and all of the issues and render wholly ineffective any and all findings made by the jury.

The judgment of the District Court, finding that there was a mutual mistake between the parties and reforming the written Operating Agreement, was undoubtedly based upon the findings of the jury that there was a prior, oral agreement between the parties and that the written agreement was delivered only on a condition. This part of the District Court's judgment has been reversed.

The opinion of the Court of Appeals is, in large and material part, based upon the answer of the jury to Special Issue No. 6. Petitioner says that the appellate court's opinion is based upon such answer, because in commencing its

argument on estoppel, the Court says that, "The jury in answer to Special Issue No. 6 found that Ashland by its conduct led Beal to believe that Ashland had agreed to 'carry' his one-fourth interest in the lease." (Rec. 614.)

The fallacy in both the judgments of the District Court and the Court of Appeals is that the courts rely upon the answer of the jury to a particular special issue finding that Ashland had led Beal to believe that it had agreed to carry his interest, when the Court had incorrectly controlled the jury's answer to this and every other issue by instructing them that they must so find for Beal and against Ashland.

Can there be any doubt but that the incorrect instructions given the jury by the District Court materially affected the jury's findings in favor of Beal? We think not. If this be true, then the error of the Court has materially harmed Petitioner and subjected it to a money judgment of more than Sixty Thousand Dollars ($60,000.00) without any independent, unbiased finding of fact by the fact finding body.

CONCLUSION

This Petition for review of the cause presents the primary issue of whether a contract made in Texas, affecting Texas land, and set up in a Federal court in Texas, is governed and controlled by local law as made by statute and the decisions of the appellate courts of the state.

As said by this Court in *King v. Order of United Commercial Travelers, 333 U. S. 153, 68 S. Ct. 488*, to-wit:

> "The Rules of Decision Act commands federal courts to regard as 'rules of decision' the substantive 'laws' of the appropriate state, except only where the Constitution, treaties or statutes of the United States provide otherwise. And the Erie R. Co. case decided that 'laws,' in this context, include not only state statutes, but also the unwritten law of a state as pronounced by its courts."

It is believed that this rule is based in large part upon that reasoning stated by Mr. Chief Justice Hughes in *Fidelity Union Trust Co. v. Field, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 109*, as follows:

> "It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstances of diversity of citizenship."

It is Petitioner's argument that if this controversy had been litigated in the State court, the judgment of the District Court would have already been reversed and rendered.

WHEREFORE, Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court as provided by statute and the rules and the decisions of the courts of the United States, and that the judgment of said Court of Appeals,

as well as the District Court, be reversed, and for such other and further relief as to this Court may seem proper.

Dated this 30 day of December, 1955.

Respectfully submitted,

W B Browder Jr

W. B. BROWDER, JR.,
P. O. Box 670,
Midland, Texas,
Attorney for Petitioner.

Of Counsel:
STUBBEMAN, MCRAE & SEALY,
Midland, Texas.

I, W. B. Browder, Jr., the attorney of record for Petitioner, certify that on the 30 day of December, 1955, a true and correct copy of the foregoing Petition for Writ of Certiorari was duly served on the Respondent, Carlton Beal, by mail, by depositing a copy of the same in a United States Post Office, with first-class postage paid, addressed to each of his counsel of record at his Post Office address.

W B Browder Jr

W. B. BROWDER, JR.

APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,316

ASHLAND OIL & REFINING COMPANY,

Appellant,

versus

CARLTON BEAL,

Appellee.

Appeal from the United States District Court for the Western District of Texas.

(July 22, 1955.)

Before RIVES, Circuit Judge, and DAWKINS and DeVANE, District Judges.

RIVES, Circuit Judge: The principal issue is whether appellee Beal is personally liable for one-fourth of the cost of drilling, developing and operating on 237.33 acres of the Elser oil and gas lease in Upton County, Texas, owned by Beal and Ashland in the proportions of one-fourth and three-fourths, respectively. The Elser lease secured by Beal on December 9, 1950, was on a total of 277.33 acres of land, but the Beal-Russell No. 1 well had been drilled on 40 acres in the northeast corner thereof prior to the transactions here involved. Beal had executed division orders to Ashland covering Beal's share of the oil from that well

and from fourteen more producing leases other than the Elser lease.

Beal brought this suit to recover the value of his share of the oil produced from the Beal-Russell No. 1 well and from said fourteen other producing leases which was being withheld by Ashland. Ashland defended, claiming that it had rightfully withheld all such amounts, and also filed its counterclaim against Beal for one-fourth of the costs and expenses incurred in drilling, developing and operating on 237.33 acres of the Elser lease under the terms of a written operating agreement between Beal and Ashland, dated as of the 8th day of April, 1951, which Ashland claims to be the contract between the parties. Answering Ashland's counterclaim, Beal pleaded substantially four defenses, which for convenience of discussion we re-arrange in the order following.

First: Conceding arguendo that the written operating agreement controlled, Beal said that Ashland had failed to give Beal notice of its intention to drill the wells on said leasehold with the result under the terms of said agreement that Beal would be considered as having elected not to participate in the cost of the wells.

Second: The operating agreement never became effective because it was delivered on a written condition which has not been fulfilled.

Third: The operating agreement was executed as a result of mutual mistake.

Fourth: Ashland is estopped from now seeking to hold Beal personally liable.

The case was tried to a jury without distinction as to which of the issues were submitted to the jury as a matter of right, and as to which the jury's verdict was merely advisory. See Rule 39, F. R. C. P. Evidence of oral conversations and letters preceding the written agreement were freely admitted by the court, Ashland reserving exceptions thereto. A number of exceptions were also reserved to the court's charge to the jury. The jury returned its verdict on special issues as set forth in the margin.[1] Each party moved for judgment. The court entered judgment for Beal against Ashland in the sum of $62,473.34 and interest thereon from July 1, 1954; that Ashland take nothing by its cross-action; and that the operating agreement be reformed as prayed by Beal.

First: Relating to what we have designated as Beal's first defense to Ashland's counterclaim, the court submitted to the jury special issues 10, 11 and 12, which the jury

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[1] "1. That Ashland Oil & Refining Company orally agreed with Carlton Beal that Ashland Oil & Refining Company would carry the one-fourth working interest of Carlton Beal in the lease in question without any personal liability on his part.

"Answer 'Yes' or 'No.'

"Answer Yes.

"2. That Ashland Oil & Refining Company orally agreed with Carlton Beal that Ashland Oil & Refining Company would carry the one-fourth working interest of Carlton Beal in the lease in question and, Ashland Oil & Refining Company in its purchase of the 8-5/8th inch casing used on the lease, orally agreed to then pay Carlton Beal $4,526.83 for his one-fourth interest in such casing and carry the amount as a part of the development costs.

"Answer 'Yes' or 'No.'

"Answer Yes.

"3. That the lease, assignments, net profits agreement and written operating agreement bearing date of April 8th, 1951, were the agreements between the parties with respect to the payment of developing and operating costs incurred on Carlton Beal's one-fourth working interest on the lease in question.

"Answer 'Yes' or 'No.'

"Answer No.

(Footnote 1 continued on next page.)

answered favorably to Ashland. While there was no evidence that Ashland gave Beal the formal kind of notice called for in the operating agreement, it appeared without conflict that notices of the proposed locations and the drilling program were sent to Beal both by the Railroad Commission and by Ashland, and that Beal, in a number of letters to Ashland, discussed the drilling of these wells in a manner which showed that he considered himself as a

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(Footnote 1 continued from p. 55.)

"4. That the written operating agreement bearing date April 8th, 1951, was delivered by Carlton Beal on condition that his working interest in the lease in question was to be carried by Ashland Oil & Refining Company and such agreement to carry would be reduced to writing at a later date and be signed by the parties.

"Answer 'It was' or 'It was not.'

"Answer Yes.

"5. That the written operating agreement bearing date April 8th, 1951, was signed and delivered by the parties thereto as the result of a mutual mistake as to the method of payment by Carlton Beal to Ashland Oil & Refining Company of one-fourth of the developing and operating costs and that the actual agreement of the parties controlling such payments was otherwise than as set out in the operating agreement bearing date April 8th, 1951.

"Answer 'Yes' or 'No.'

"Answer Yes.

"6. That Ashland Oil & Refining Company by its conduct led Carlton Beal to believe that such company had agreed to carry his one-fourth interest in the lease in question.

"Answer 'Yes' or 'No.'

"Answer Yes.

"7. Do you find from a preponderance of the evidence that at the time of the telephone conversation or conversations between Carlton Beal and C. H. Marshall, for Ashland Oil & Refining Company, and the subsequent conversations between C. H. Marshall, for Ashland Oil & Refining Company, and R. D. Carpenter for Carlton Beal, it was the intention or in the contemplation of the parties that before there was any contract the terms thereof should be reduced to writing and signed by the parties.

"Answer 'It was their intention that the contract be reduced to writing' or 'It was not their intention that the contract be reduced to writing.'

"Answer It was their intention that it be reduced to writing.

"8. Do you find from a preponderance of the evidence that it was a part of the agreement between Carlton Beal and R. D. Carpenter on the one hand, and C. H. Marshall and John Crawford for Ashland Oil & Refining Company on the other hand, that Ashland should have a call on Beal's oil for five (5) years?

"Answer 'Yes' or 'No.'

"Answer Yes.

(Footnote 1 continued on next page.)

working partner therein. We agree with the jury, therefore, that Beal's first defense to Ashland's counterclaim was not sustained.

Second: The facts with reference to Beal's second defense to Ashland's counterclaim, conditional delivery of the written agreement, must be briefly reviewed. Two copies of the operating agreement appear to have been signed by Beal on April 8, 1951. These were forwarded to Ashland by a letter dated April 11, 1951, stating that "it is understood that your company will execute the same and return one copy to this office," and further calling attention that Exhibit A, describing the lease affecting the joint proper-

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(Footnote 1 continued from p. 56.)

"9. Do you find from a preponderance of the evidence that it was a part of the agreement between Carlton Beal and R. D. Carpenter on the one hand, and C. H. Marshall and John Crawford for Ashland Oil & Refining Company on the other hand, that Beal would secure payment of his part of the drilling and operating costs of the Elser Lease by a mortgage on Beal's interest in the Beal-Russell No. 1 well?

"Answer 'Yes' or 'No.'

"Answer No.

"10. Do you find from a preponderance of the evidence that on or before July 25, 1951, Ashland Oil & Refining Company gave Carlton Beal notice of its intention to proceed to drill five (5) wells on the Elser Lease in addition to those two (2) wells already completed on said lease?

"Answer 'Yes' or 'No.'

"Answer Yes.

"11. That Ashland Oil & Refining Company notified Carlton Beal of its intention to drill each additional well after Well No. 1, and notified Carlton Beal of the estimated cost of each such well, all in advance of the commencement date of each such additional well.

"Answer 'It gave notice,' or 'It gave notice on wells numbers (numbering them) 2, 3, 4, 5, 6.'

"Answer Yes it gave notice.

"12. If you answer 'yes' to the foregoing paragraph 11 of your verdict, and only in that event, then answer:

"That Carlton Beal did or did not within fifteen days after he was notified of Ashland Oil & Refining Company's intention to drill additional wells being notified of the additional costs of each such well after Well No. 1, agree in writing that he, Carlton Beal, would personally participate in the drilling and operating costs of each such additional well.

"Answer 'He did not agree on any well' or 'He did agree on wells numbers (numbering them) 2, 3, 4, 5, 6.'

"Answer Yes he did agree."

ties, had not been filled in and giving the information from which it could be filled in. Ashland returned the two copies which Beal had signed, together with two additional copies, by a letter dated May 17, 1951, in which it was stated that all four copies had been signed and acknowledged by Ashland, and in which it was requested that Beal acknowledge the two copies he had originally signed, and sign and acknowledge one additional copy, and return these three copies to Ashland. Beal complied with this request and forwarded the three executed and acknowledged copies to Ashland along with a letter dated May 23, 1951, from Beal's employee, Carpenter, to Ashland's employee, Crawford,[2] which forms the basis for Beal's claim of conditional delivery of the operating agreement.

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[2] "Carlton Beal
"11699 Bellagio Road
"Los Angeles, 49
"May 23, 1951

"Mr. John L. Crawford,
215 Crawford Hotel,
Midland, Texas.

Dear John:

"Complying with your letter of May 17, 1951, we are transmitting herewith three executed and acknowledged copies of Operating Agreement dated April 8, 1951, between Ashland Oil & Refining Company and Carlton Beal.

"It is my recollection that you are going to prepare Development Loan Agreement between Ashland and Carlton providing that Ashland is to carry his share of development and production expenses until payout. Carlton advises me that in accordance with his conversation with Cob Marshall this Loan Agreement would cover six Spraberry wells on the Elser lease at 4 to 4½% interest payable out of 80% of 25% of the working interest gross revenue. I further recall that this Development Loan Agreement or a separate letter agreement was to be prepared covering Ashland's call on Carlton's share of the oil. In this instance there was to be a provision that Ashland would have a call on said oil for five years and there after until bona fide sale of Carlton's interest.

"When the above papers have been prepared and executed I believe this deal will be wrapped up.

"My best regards,

"(S.) DICK,
R. D. CARPENTER."

Peculiar significance is attached to the word "carry" as used in that letter (footnote 2). From the testimony of a number of oil operators, it seems to be established that in oil field terminology the term "carried interest" means an interest that pays no part of the initial development except out of the oil and gas produced, though the detailed terms of such an interest would have to be fixed by agreement.[3] Beal testified that he expected such details to be worked out in a written agreement, but that that was never done. Ashland freely concedes that an oral understanding existed by virtue of which it was to finance Beal and that Ashland was later to submit the necessary papers for that purpose, but it denies any intention to "carry" Beal in the sense that he would not be personally liable for his proportionate share of the cost of development. Its agent who received the letter (footnote 2) testified that, if the term "carried interest" had been used, he would have understood the letter in the sense to which Beal testified, but that, "* * * there is a big difference in my mind between 'to carry' and to own a carried interest," and that that letter did not give him the information that Beal thought that he would have no personal liability.

Beal argues that the last sentence in the letter, "When the above papers have been prepared and executed I believe

[3]For example, whether the operator, that is the party who is putting up the cost of development, has control of the oil and the right to sell it or the carried party can sell his part of the oil: whether the carried interest is to be carried for the initial development phase only of the operation or for the life of the lease; whether interest is to be charged and, if so, the rate; who would own the equipment, such as pipe, motors and pumps, if and when production ceased; and other detailed terms.

this deal will be wrapped up," made the preparation and execution of the loan agreement a condition precedent to the effectiveness of the operating agreement. There is a serious question as to whether the operating agreement had not been unconditionally delivered and made effective prior to the letter (footnote 2); but assuming arguendo that it had not, it seems to us far fetched to claim that that letter attached a condition precedent to the operating agreement becoming effective. Clearly, we think, that was not Beal's intention for he has himself throughout depended on the operating agreement in other respects. For example, he billed Ashland for engineering work which he had done on the Elser lease pursuant to Ashland's commitment in the operating agreement to pay therefor; he sold certain pipe to Ashland, and sent Ashland a bill "because they (Ashland) had agreed in this operating agreement to pay all expenses within a certain time and that was one of the expenses." Both on direct and on cross-examination, Beal testified that it was his contention that portions of the operating agreement are effective, and that he relied upon portions of that agreement.

The conclusion to which Beal's contention of conditional delivery leads is thus expressed in his counsel's brief: "Since Ashland exercised its legal right as a cotenant to drill and operate the lease without any contract with its cotenant, Beal, it is not entitled to hold him personally liable for the drilling and operating costs incurred by it,

but is merely entitled to recover Beal's one-fourth of those costs out of Beal's one-fourth share of the production." We do not understand that the district court in rendering its judgment proceeded on any such theory, for it actually ordered the operating agreement as an existing contract to be reformed to express what it considered to be the intention of the parties. There was no substantial evidence, we think, to sustain the contention that the written operating agreement never became effective because delivered on a written condition which has not been fulfilled.

Third: Beal's third defense to Ashland's counterclaim, that the operating agreement was executed as a result of mutual mistake, was evidently that adopted by the district court in rendering its judgment. It does appear practically without dispute that there was some verbal understanding, which Ashland was later to reduce to writing, under which Ashland was to finance Beal's share of the cost of development, but the evidence is in sharp conflict as to whether that understanding went to the extent that Beal was to have no personal liability and that Ashland was to be repaid only out of the oil and gas produced from the leasehold. There was substantial evidence to support the jury's verdict on the first issue submitted (footnote 1, *supra*), that Ashland orally agreed to "carry" the one-fourth working interest of Beal without any personal liability on his part.

That, however, is not enough to authorize the reformation of the written operating agreement for mutual mis-

take. It must further appear that there was a mutual mistake as to the contents or effect of the written agreement itself. *Tunnell v. Neill, 33 S. W. 2d 530, 533; Long v. Humble Oil & Refining Co., 154 S. W. 2d 925; Sun Oil Co. v. Bennett, 84 S. W. 2d 447; Henning v. Jefferson Standard Life Ins. Co., 129 F. 2d 224;* 2 Pomeroy's Equity Jurisprudence, 4th ed., Sec. 854. There could be no mistake as to the effect of the written agreement in merging all prior verbal negotiations and understandings, for that is the law under which all parties must operate and which must certainly have been in fact understood by these parties who had vast business experience in large affairs. Nor was there any mistake as to the contents of the written operating agreement, for Beal himself testified that he read it, submitted it to his attorneys, and that he and his lawyers and tax consultant knew what he was doing. Indeed, Beal's counsel concedes in brief:

> "* * * it appears that both Ashland and Beal knew that the provisions with reference to Beal's paying monthly one-fourth of the developing and operating costs were physically incorporated in the Operating Agreement, * * *."

The district court erred, therefore, in reforming the written operating agreement.

Fourth: On Beal's fourth defense to Ashland's counterclaim, the jury in answer to Special Issue No. 6 found that

Ashland by its conduct led Beal to believe that Ashland had agreed to "carry" his one-fourth interest in the lease (footnote 1, *supra*). As has been stated, Ashland admits that it had some understanding that it would finance Beal and that Ashland would prepare the necessary papers. Beal followed up his letter of May 23, 1951 (footnote 2, *supra*) with a letter of July 5, 1951, saying:

> "This is to remind you and make a matter of record a certain agreement that I have with Ashland Refining Company wherein Ashland is paying all the drilling costs of which my share is 25%. I am to pay my share of these drilling costs out of the production after taking out production costs.
>
> "I would like to know from you how this is to be handled; whether you are to make the payments for oil sales to me and I am to return the check to the Ashland to apply to my account to pay out my share of the drilling costs.
>
> "I would appreciate hearing from you about this matter."

Under date of July 13, 1951, Ashland responded:

> "In reply to your letter dated July 5, 1951, please be advised, that John L. Crawford, of our Midland, Texas office, has informed me that he has been corresponding with your Dick Carpenter, with regard to a financing arrangement covering your interest in the subject lease, and also your #1 Beal-Russell lease, which agreement will prove that all, or a portion of your interest be paid to Ashland Oil & Refining Company until your proportionate part of the drilling costs have been recovered."

Beal's reply to that letter is of such importance that we copy it in full in the margin.[4] Beal's letter of July 19, 1951 (footnote 4, *supra*), was never answered. The record does not reveal any further correspondence between the parties with respect to the financing of Beal's interest until some ten months later. Meanwhile, production from the lease

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[4] "July 19, 1951

"Ashland Oil and Refining Company
621 Apco Tower
Oklahoma City 2, Oklahoma

"Attention: Mr. Harry C. Marberry
"Re: Ashland Oil and Refining Company Beal-Russell
(Elser) #1—Your No. 2025

"Gentlemen:

"Replying to your letter of July 13, 1951, please be advised that in January of this year Mr. R. D. Carpenter of this office met with your Mr. C. H. Marshall in Midland at which time the Elser Lease, Upton County, Texas, was negotiated to your company.

"It was the desire of the undersigned that your company finance my 25% working interest in the wells to be drilled on the Elser Lease, both as to drilling and production costs, and it was agreed that your company was to retain 100% of proceeds from oil and gas production until the aforesaid costs, plus 4½% interest per annum were recovered. At the time Mr. Marshall and Mr. Carpenter were discussing the matter there was only one producing well on the subject lease. Understandably Mr. Marshall stated that your Company's policy was to require additional collateral, so that in event a dry hole or dry holes were drilled on the Elser Lease Ashland would not have an unduly long payout period.

"Mr. Carpenter then agreed with Mr. Marshall that the income from my 25% working interest (1/4 of 5/8 of 8/8) in the Beal-Russell #1 well would be pledged as additional security to apply when and if a dry hole were drilled on the property. The Elser wells were to stand on their own unless a dry hole were drilled on the Elser Lease, at which time my income from the Beal-Russell #1 well would go to Ashland until drilling and production costs plus interest on the Elser wells had been recovered. It is not contemplated that my Beal-Russell #1 income would go to Ashland from the beginning of Ashland's operations on the Elser Lease, however.

"I believe the above outlines our understanding made with Mr. Marshall. Would you kindly verify the above with him and prepare the financing agreement accordingly. If the above is not strictly in accordance with Mr. Marshall's understanding, please advise.

"Very truly yours,
CARLTON BEAL.

"CB/cmj
"cc: Mr. C. H. Marshall
Mr. John L. Crawford
Mr. Hal Rachal"

had decreased more than fifty per cent. It was not until May 22, 1952, that Ashland wrote stating:

> "At long last I have prepared and submit for your approval a mortgage and note from Carlton Beal, in favor of Ashland Oil & Refining Company covering the advances made to Mr. Beal in the development and operation of the Elser Lease."

Enclosed was an installment promissory note and a deed of trust for Beal's execution. Beal refused to execute the note and deed of trust and wrote Ashland on June 2, 1952, that the instruments submitted were not in accordance with their agreement.

At the time Ashland received Beal's letter of July 19, 1951 (footnote 4, *supra*), the drilling of wells numbered 2, 4 and 6 had not been commenced. Under the operating agreement, Beal had a right to elect not to participate in the drilling of those wells. If Ashland had replied to Beal's letter of July 19, 1951, that its understanding of their agreement was not as therein outlined by Beal, it may be that Beal by outside arrangements could have avoided all or a part of the large personal liability to which he was and would be subjected under the terms of the operating agreement. The sharp decrease in gross production from the field did not come until the following April.

Ashland urges that its failure to answer Beal's letter cannot be treated as an admission, citing *Texas Co. of Mexico, S. A. v. Roos, 5th Cir., 43 F. 2d 1, 14; Leach & Co. v. Peirson, 275 U. S. 120; Aetna Life Ins. Co. v. Kep-*

ler, 8th Cir., 116 F. 2d 1; Throckmorton v. St. Louis-San Francisco Ry. Co., 8th Cir., 179 F. 2d 165; and McCormick & Ray, Texas Law of Evidence, Sec. 504, p. 653. With this we would agree if Ashland were under no duty to reply. Ashland had, however, promised to draft the agreement to finance Beal, and it had failed to do so. It knew that Beal was waiting for it to fulfill its promise to draft that agreement, and if it planned to draft an agreement differing from Beal's understanding, it should have promptly so advised him, especially in view of Beal's request to that effect (footnote 4, *supra*).

Silence alone, where there is a duty to speak, may create an estoppel. As recognized by the Supreme Court of Texas in *Johnson v. Sovereign Camp, W. O. W., 125 Tex. 329, 83 S. W. 2d 605, 609:* "'From pure but misleading silence, coupled with a duty to speak, an estoppel will arise.' Bigelow on Estoppel, 565." Likewise, the same Court in *Burnett v. Atteberry, 105 Tex. 119, 145 S. W. 582, 587,* stated:

> "The principle (estoppel) is an important one in the administration of the law. It not infrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. * * *
>
> "'Estoppel by silence arises where a person, who by force of circumstances is under a duty to another to speak, refrains from doing so and thereby leads the other to believe in the existence of a state of facts in reliance upon which he acts to his prejudice'."

See also, *Commercial Nat. Bank v. Nacogdoches Compress and W. Co., 133 Fed. 501.*

We think that Beal was clearly entitled to assume that Ashland's failure to reply to his letter of July 19, 1951 (footnote 4, *supra*), indicated its approval of his understanding of the agreement to finance, and that Ashland is now estopped to deny that the terms outlined in that letter constituted the financing agreement between the parties.

The judgment is, therefore, modified so as to eliminate that part reforming the written operating agreement dated April 8, 1951, and in lieu thereof to provide that Ashland is estopped to deny that its agreement to finance Beal is in accordance with Beal's letter of July 19, 1951 (footnote 4, *supra*), and, as so modified, the judgment is affirmed.

MODIFIED AND AFFIRMED.

JOHN A. FEEHAN, JR., Clerk
By /s/ Clara R. James
Clerk of the United States Court
of Appeals for the Fifth
Circuit.

A True Copy:
Teste:
(Seal)

APPENDIX B

JUDGMENT

No. 15,316

Extract from the Minutes of July 22, 1955

ASHLAND OIL & REFINING COMPANY,

versus

CARLTON BEAL

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, modified so as to eliminate that part reforming the written operating agreement dated April 8, 1951, and in lieu thereof to provide that Ashland is estopped to deny that its agreement to finance Beal is in accordance with Beal's letter of July 19, 1951, copied in footnote 4 of the opinion; and as so modified that said judgment be, and it is hereby, affirmed;

It is further ordered and adjudged that the appellant, Ashland Oil & Refining Company, and the surety on the appeal bond herein, St. Paul Mercury Indemnity Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C

OPERATING AGREEMENT

THIS AGREEMENT made and entered into this 8th day of April, 1951, by and between Ashland Oil & Refining Company, a Kentucky Corporation, of Ashland, Kentucky, herein designated as OPERATOR, and Carlton Beal, hereinafter referred to as NON-OPERATOR.

WITNESSETH THAT:

WHEREAS said parties are the owners of oil and gas interests or oil and gas leases covering lands hereinafter described; and

WHEREAS said parties desire to enter into this agreement providing for the joint operation, development and management of said properties:

NOW THEREFORE, it is agreed as follows:

1. *OPERATOR:*

Ashland Oil & Refining Company is hereby designated Operator of the joint premises as hereinafter defined.

2. *LANDS AND LEASES:*

The lands covered by this agreement are described as follows:

> The West 277.33 acres of the South Half (S/2) of the C. C. DeWitt Survey No. 1, Block X, Upton County, Texas, less and except forty (40) acres in the form of a square out of the Northeast corner thereof.

The leases covering said lands are listed in Exhibit "A," attached hereto and made a part hereof. The described premises are sometimes hereinafter referred to as "joint premises," "joint operation area," or "joint properties."

3. *OPERATING INTERESTS:*

The parties hereto have agreed jointly to explore, develop and operate for the production of oil and gas the lands embraced within the area above described. All costs, expenses and liabilities accruing to or resulting from the operation of the joint properties pursuant to this agreement shall be determined, shared and borne by the parties hereto in the following respective proportions:

Ashland Oil & Refining Company	75%
Carlton Beal	25%

4. *MANAGEMENT AND RESPONSIBILITY:*

Operator shall have, subject to the specific restriction hereinafter set forth, the sole and exclusive management and control of the testing, exploration, drilling, development and operation of the joint operation area for the production of oil, gas and other minerals for the joint account of the parties hereto. Operator shall consult with Non-Operator from time to time so that all matters of policy may be mutually agreed upon for the best interest of all. In the absence of mutual agreement and in all emergency matters, the decision of Operator exercised in good faith shall be final, except as to action otherwise provided by this agreement. Neither party hereto shall ever be liable to the other party hereto for any acts done or omitted in

good faith in the performance of any provisions of this agreement.

5. *OPERATOR'S DUTIES:*

Subject to the qualifications elsewhere herein provided, Operator shall make a good faith effort to maintain in force and effect and protect the oil, gas and mineral leases affected hereby and to perform the obligations contained therein and to conduct such operations in compliance with all applicable rules and regulations of governmental agencies having jurisdiction in the premises. Operator, for the joint account, shall pay all taxes hereafter specified, rentals and royalties and other payments due or to become due upon the jointly owned premises or arising out of the operation thereof. Except as hereinafter specifically provided, Operator shall secure and furnish all material, labor and services necessary for the proper development and operation of the joint area. Upon written request from Operator, Non-Operator shall secure and furnish his proportionate part of any such material, labor and services in kind or by satisfactory assignment of priorities, allocations or business commitments; provided, however, that Operator agrees to furnish all pipe and casing for the next five (5) wells to be drilled but the cost thereof shall be charged to the joint account.

6. *ACCOUNTING AND RECORDS:*

All costs and expenses of operations on the premises, unless otherwise herein expressly provided, shall be charged to the parties in the proportions hereinabove provided. All material, equipment, supplies and other proper-

ties purchased for the joint account shall be owned in the same proportions. Operator shall keep separate books and accounts showing a thorough and accurate record of all costs and expenses incurred and all income derived by it in connection with the operations of the jointly owned premises and in accordance with the detailed provisions therefor set forth in the accounting procedure attached hereto as Exhibit "B." The expenses chargeable shall not necessarily be limited to the items of expense listed in the accounting schedule but shall include all those reasonably necessary or useful for the ordinary and efficient development and operation of the joint area for the benefit of all parties hereto. In the event of any conflict between an express provision of this agreement and a provision of Exhibit "B," the provisions of this agreement shall control. The books and records of Operator insofar as they may relate to the development and operation of the jointly owned premises shall be open to the inspection of the Non-Operator or to his duly authorized representatives at reasonable times and at Operator's principal place of business.

7. *AUDITS AND TESTS:*

Non-Operator at reasonable times and at his own cost may make or have made audits of the joint account and such tests of the well or wells or the production therefrom as are customary in good business and petroleum engineering practice.

8. *STATEMENTS AND PAYMENTS:*

Operator shall furnish Non-Operator, before the last day of each month, with an itemized statement of all costs

and expenses for all operations on the joint property incurred or paid during the preceding calendar month. Upon request, such statements shall be supported by copies of all invoices, work orders or other applicable papers or records. Non-Operator shall pay his proportionate share of all costs and expenses within fifteen (15) days after receipt of such statement. If Non-Operator fails to make payment of any amount provided hereunder when due, the unpaid amount shall bear interest at the rate of six (6%) percent per annum until paid. Payment shall not prejudice the right to protect the correctness of any statement. Any exceptions to the statements as rendered by Operator shall be made within one (1) year of the receipt thereof and if no exceptions be made within such time then such statement shall be considered as correct. This provision, however, shall not prevent annual adjustments of records of the physical properties to actual inventory as provided in Exhibit "B."

9. *ADVANCES:*

Operator at its election and from time to time may require of Non-Operator an advance deposit of the latter's proportinate share of anticipated cash expenditures by furnishing Non-Operator with an estimate of such cash required to cover operations for a period not in excess of sixty (60) days. Within fifteen (15) days after receipt of such estimate, but in no event earlier than ten (10) days after commencement of the period covered by such estimate, Non-Operator shall pay his proportionate part thereof. At the end of each ninety (90) days after the com-

mencement of the period to which the advance deposit applies, the amount thereof shall be adjusted in accordance with prospective expenditures. Such advance as adjusted from time to time and in the manner set forth above shall be maintained until the termination of the joint operation unless otherwise determined by Operator. Current bills shall be sent and paid as otherwise provided in this agreement, without application of the advance deposit unless Operator elects to apply the deposit to amounts in arrears, in which event Operator may request immediately restoration by Non-Operator of his proportionate part of this advance.

10. *LIENS AND INDEMNITY:*

In order to secure Operator for expenditures made by it for the benefit of the joint account hereunder, it is agreed that Operator shall have and is hereby granted the first and prior lien upon all the rights, title and interest and estate of Non-Operator in and to the joint operation area and any personal property and equipment located thereon or used in connection therewith and on all oil, gas and other minerals produced and saved therefrom and the proceeds thereof, such lien to be enforceable as any other lien and in addition thereto and cumulative thereof. Non-Operator agrees at any time when he shall be arrears in payment hereunder, but only in such event, to execute, upon request of Operator, such additional instruments as may be necessary or desired better to secure such lien and to provide for the prior payment thereof. In the event Non-Operator should fail or refuse to pay Operator any sum

due under the provisions hereof, it is agreed that Operator may apply in payment or part payment thereof or as an offset thereto any sums in the hands of Operator belonging to Non-Operator. Operator shall hold Non-Operator harmless from any lien or encumbrance on Non-Operator's interest in the operating unit and all material and equipment therein and thereon or production therefrom, by reason of the failure of Operator to pay, liquidate and discharge any and all claims, obligations and charges hereunder as to such interest for which Non-Operator shall have theretofore paid Operator for his portion thereof.

11. *APPROVAL OF PLANS:*

Prior to the drilling, deepening or reworking of any well hereunder, Operator shall furnish Non-Operator with full information concerning the location of the well, the proposed total depth, tentative casing program and estimated cost of the proposed operation. Except in the case of operations required to be conducted under the express or implied covenants of a lease or leases affecting the joint properties, such operation shall not be commenced for the joint account until Non-Operator has agreed thereto, provided that if Non-Operator fails to reply in writing within fifteen (15) days after receipt of such notice, such failure to reply shall be construed as an election not to participate therein with the same effect as non-participation in independent operations as hereinafter provided.

Except for operations and expenditures expressly agreed upon, no expenditures shall be made by Operator for any operation hereunder or for a capital investment, in excess

of $5,000.00, without written consent of Non-Operator. Such consent shall be presumed unless Non-Operator replies within ten (10) days after notice from Operator of the proposed expenditure and requesting consent thereto.

12. *INDEPENDENT OPERATIONS:*

Each party hereto shall be obligated to participate in the cost of drilling any well or other operations specifically described herein or required by any express or implied obligation under any lease covering the joint operation area. No party, however, shall be required to participate in the cost of any drilling, deepening or reworking of any other well hereunder. Should any party desire to drill any other well or wells or to deepen or rework any well after such well should cease or fail to produce oil or gas in paying quantities at the depth to which it may have theretofore been drilled and completed, the party desiring to drill, deepen or rework such well, as the case may be, shall notify the other party, giving the particulars of the drilling plan in the manner set forth above.

Within fifteen (15) days after receipt of such notice, the party notified shall advise the party giving such notice whether the former will participate in the cost of the proposed operation. Failure to reply within the time provided shall be construed as an election not to participate. If both parties elect to participate, Operator shall perform the proposed operations as a normal joint operation hereunder. If the party notified elects not to participate, the

party giving such notice, shall proceed with such proposed operation, including completion and equipping of the well, under the terms hereof to the extent of such operation, at no cost, risk, and expense to the non-participating party. If any well be completed as a producer, it shall be taken over and operated by Operator and the party drilling this well shall be entitled to receive all of the proceeds from the sale of the production therefrom, after deducting all royalty, overriding royalty interests and production payments, if any, until said drilling party shall have received from the proceeds of the sale of such production an amount equal to the total operating expense thereof plus 200% of the total cost of drilling, testing, completing and equipping said well.

Until the drilling party shall have received the sums above provided for, the non-participating party shall have no interest in the material and equipment placed on or in such well in connection with and to the extent only of such operation and the drilling party may remove and salvage the same in order to obtain the sum to which it may be entitled. After the drilling party shall have received such sum, the well and all equipment thereof or the salvage thereof and the production therefrom shall be owned in the same proportions as the production and the proceeds from other wells on the premises subject hereto and all expenses of operating said well shall be borne by the parties hereto in the same proportions and manner as other expenses.

13. *INFORMATION:*

Non-Operator shall have access at all reasonable times to all operations on or relating to the joint operation and to the wells or records and data pertaining thereto.

14. *ASSIGNABILITY:*

Subject to such provisions as may appear in paragraph twenty-five (25) below, this agreement shall be assignable and covenants, obligations, terms and provisions hereunder shall run with the assignment and extend to and be binding upon the heirs, successors and assigns of the parties hereto.

15. *INSURANCE:*

Operator shall secure and maintain at the expense of and for the joint account the following insurance:

(1) Workmen's compensation in accordance with the laws of the State of Texas and Employers' Liability with limits of not less than $25,000.00 as to any one employee, and $50,000.00 as to any one accident.

(2) Public Liability insurance with limits of not less than $25,000.00 as to any one person and $300,000.00 as to any one accident, and property damage liability with a limit of not less than $25,000.00 for each accident and $100,000.00 for any number of accidents.

(3) Automobile Public Liability insurance with limits of not less than $100,000.00/$300,000.00 and Automobile Property Damage insurance with a limit of not less than $10,000.00 to cover all automotive equipment.

16. *LIABILITY:*

The liability of the parties to third persons shall be several and not joint or collective. Each party shall be responsible only for its share of the obligations as herein set out, and shall be liable only for its proportionate share of the cost of developing and operating said properties. It it not the intention of the parties hereto to create a partnership or a mining partnership, or to permit such relationship to exist and nothing in this instrument shall be construed as creating such a relationship.

17. *EMPLOYEES:*

The number of employees, the selection of such employees, the hours of labor and the compensation for services to be paid any and all such employees shall be determined by Operator. Such employees shall be the employees of Operator.

18. *ABANDONMENT OR RELEASE:*

No well which is producing or has once produced shall be abandoned without the mutual consent of the parties hereto; provided, however, that either party hereto may, at any time when there is no accrued obligation to drill or otherwise operate under this agreement or the leases covering the joint premises, notify the other party that he or it desires to release an interest in the leases or a portion thereof. The party notified shall have right for sixty (60) days thereafter to receive, upon demand, an assignment, which shall be made without warranty, of the interest concerning which notice was given. In the event the notified

party does not timely accept such assignment from the abandoning party, or tender for execution a joint release of the affected interest, the party originally giving the notice shall be fully indemnified and held harmless against any and all claims, expenses, loss, damage or liability arising out of the maintenance of said lease, and cumulative thereof, shall have the right to compel by judicial action joinder in the release by the other party.

As between themselves, no party hereto shall be relieved, by assignment or release, of any obligation theretofore accrued, whether arising under lease, this agreement or otherwise, but shall be relieved of all obligations thereafter accruing and any party accepting assignment shall be liable and responsible for the performance of all obligations thereafter accruing and shall hold the assigning party harmless therefrom. The provisions of this section are subject to that certain Net Profits Agreement dated April 7, 1951, between Ashland Oil & Refining Company and Ira D. Aten, et al.

19. *SALVAGE:*

In the event of an assignment from one party to another hereunder as above provided, the party receiving such assignment shall pay to the party making such assignment the salvage value of such party's interest in the material and equipment located on or in the premises assigned, such value to be determined in accordance with the attached "Exhibit B—Accounting Procedure." In the event of joint release, Operator shall salvage as much of the material

and equipment located upon the joint premises as possible and credit the joint account therewith.

20. *TAXES:*

Operator agrees to make a good faith effort to pay and discharge for the joint account as they become due and payable all taxes levied and assessed against the respective interests of the parties in the joint property, the personal property thereon and the production therefrom, including ad valorem, production and severance taxes. Operator shall be authorized in its own discretion to render the property for taxation, if that should be necessary, and in no event shall be liable for any claims of rendition at unfavorable values or for claims arising out of assertion of improper payment or non-payment of taxes. Non-Operator may at any time, by giving notice in writing to Operator, reassume its own responsibility for the rendition and payment of taxes, other than production and severance taxes, at the next succeeding payment period.

21. *NOTICES:*

All notices that are required or authorized to be given hereunder, except as otherwise specifically provided, shall be given in writing by United States Registered mail or Western Union telegram, postage or charges prepaid, and addressed to the party to whom such notice is given as follows:

Ashland Oil & Refining Company
621 Apco Tower
Oklahoma City, Oklahoma

Carlton Beal
11699 Bellagio Road,
Los Angeles 49, California

The originating notice to be given under any provision hereof shall be deemed given only when received by the party to whom such notice is directed and the time for such party to give any response thereto shall run from the date the originating notice is received. The second or any subsequent responsive notice shall be deemed given when deposited in the United States Post Office or with Western Telegraph Company, with postage or charges prepaid.

22. *TERM:*

Subject to the other provisions hereof, this agreement shall remain in full force and effect, and the joint properties shall not be subject to partition, so long as any jointly owned lease on lands in the operating unit, or any renewal or extension thereof, remains in force and effect, and thereafter until all materials, equipment, supplies and properties of every kind have been salvaged and disposed of and final settlement and accounting had between the parties.

23. *FORCE MAJEURE:*

Operator shall not be liable for any loss of property or of time caused by strikes, riots, fires, tornadoes, floods or for any other cause beyond the control of Operator through the exercise of reasonable diligence. All of the provisions of this agreement are hereby expressly made subject to all applicable Federal or State laws, orders, rules and regu-

lations, and in the event this contract or any provision hereof if found to be inconsistent with or contrary to any such law, order, rule or regulation, the latter shall be deemed to control and this contract shall be regarded as modified accordingly and as so modified shall continue in full force and effect.

24. *EXECUTION:*

The paragraph headings in this instrument are added as a convenient guide only and shall not be considered for any purpose in the interpretation or construction of the text of this agreement. Counterpart originals hereof which shall together constitute a single instrument may for the convenience be executed by either of the parties hereto either before or after the effective date hereof with the same effect as though a single original instrument had been signed by such parties.

25. *MISCELLANEOUS PROVISIONS:*

(a) *Preferential Right of Purchase*

In the event any party desires to sell all or any part of his or its interest subject to this agreement, the other party or parties hereto shall have a preferential right to purchase the same. In such event, the selling party shall promptly communicate to the other party or parties hereto the offer received by him or it from a prospective purchaser ready, willing and able to purchase the same, together with the name and address of such prospective purchaser, and said party or parties shall thereupon have

an option for a period of ten (10) days after the receipt of said notice to purchase such undivided interest for the benefit of such remaining parties hereto as may agree to purchase the same. Any interest so acquired by more than one party hereto, shall be shared by the parties purchasing the same in the proportions that the interest of each party so acquiring bears to the total interest of all parties so acquiring. The limitations of this paragraph shall not apply where any party hereto desires to mortgage his or its interest or to dispose of his or its interest by merger, reorganization, consolidation or sale of all his or its assets, or a sale of his or its interest hereunder to a subsidiary or parent company or subsidiary of a parent company or to any company in which any one party hereto owns a majority of the stock.

In the event of a sale by Operator of the interests owned by it which are subject hereto, the holders of a majority interest in the premises subject hereto shall be entitled to select a new operator but unless such selection is made the transferee of the present Operator shall act as operator hereunder. The provisions of this section are subject to that certain Net Profits Agreement dated April 7, 1951, between Ashland Oil & Refining Company and Ira D. Aten, et al.

(b) *Other Conditions, If Any:*

The terms and provisions of this Operating Agreement shall be effective as of the date of commencement of drilling operations for the well which are now in progress on the land above described.

IN WITNESS WHEREOF, the undersigned parties have signed this agreement as of this 8th day of April, 1951.

OPERATOR

ASHLAND OIL & REFINING COMPANY

By: (Signed) EVERETT WELLS,
President.

(Seal)

ATTEST:

NON-OPERATOR

(Signed) CARLTON BEAL.

FILED
FEB 1 1956
HAROLD B. WILLEY, Clerk

No. 602

In the

Supreme Court of the United States

OCTOBER TERM, 1955

ASHLAND OIL & REFINING COMPANY,
Petitioner,

v.

CARLTON BEAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

D. L. CASE,
2800 Republic Bank Bldg.,
Dallas, Texas.

A. W. WALKER, JR.,
2800 Republic Bank Bldg.,
Dallas, Texas,
Attorneys for Respondent.

Of Counsel:
ROBERTSON, JACKSON, PAYNE,
LANCASTER & WALKER.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, not yet reported, is attached hereto as Appendix A.

JURISDICTION

This Court should not take jurisdiction of this cause for the following reasons:

A. The Court of Appeals has neither applied a Texas Statute nor decided important questions of Texas land law in conflict with decisions of Appellate Courts of Texas.

B. The Court of Appeals has not decided an important question of substantive law in conflict with decisions of the Courts of Texas.

C. The Court of Appeals has not sanctioned a departure by the District Court so as to call for exercise of this Court's jurisdiction.

D. There are no special or important reasons for this Court to grant a Writ of Certiorari to review this cause.

STATUTE

The only statute which Petitioner contends is involved is Article 3995 of the Revised Civil Statutes of Texas, which is set forth in the Petition at pages 7 and 8.

Rule 49 of the Federal Rules of Civil Procedure is found at page 8 of the Petition.

STATEMENT

Although Petitioner's statement of the nature and result of the case is generally correct, Respondent Beal feels that there are two inaccuracies which should be called to the Court's attention.

At page 13 of the Petition is found the statement: "However, the jury went further and found (a) that it was the intention of the parties that *before there was any other contract than the Operating Agreement*, the terms, thereof should be reduced to writing and signed by the parties, * * *." (Emphasis added.) Ashland apparently contends that Special Issue Number 7 (R. 572) has that effect, for

the only other issue bearing upon a written instrument to be signed is Special Issue Number 4 (R. 571) which has already been mentioned by Petitioner on Page 12 of the Petition.

Special Issue Number 7 in its own terms refers to conversations between Beal and Marshall (Ashland) and between Marshall (Ashland) and Carpenter (acting for Beal), and these conversations took place in February and March, 1951, before the Operating Agreement was executed on April 8, 1951. (R. 175; 527; 33.)

It is quite clear, then, that Special Issue Number 7 refers to the Operating Agreement itself rather than to "any other contract than the Operating Agreement."

This misconception is apparently made the basis of Petitioner's argument at pages 42 through 45 of the Petition.

Also, Petitioner states at page 14 of the Petition that the letter of July 19, 1951 (copied in the opinion of the Court of Appeals at page 34 herein and found at R. 254 and 255), was not "accepted" or answered by Ashland. There is no evidence in the Record that the letter was not received by Ashland, and it was, therefore, presumably accepted.

This is an action which arose out of transactions involving the joint development and operation of property under an oil and gas lease known as the Elser Lease. Ashland and Beal are the joint owners of the lease in question (R. 18 and 19) and are cotenants under Texas Law.

Before the Operating Agreement (R. 18-59) was executed by Beal and Ashland, C. H. Marshall, a Vice-President of Ashland, agreed that Ashland would "carry" Beal's 25% of the development costs of the lease until production repaid those costs, and that Beal was to be free from personal liability for his share of these costs. (R. 175; Jury Finding No. 1, R. 570.) Even Ashland must admit that some agreement was made to finance Beal's interest, even though it denies that it was an agreement to carry Beal's interest without personal liability as found by the jury. (Special Issue Number 1, R. 570.)

Marshall admitted that in a conversation he had with Beal in February or March, 1951, he had "agreed" on behalf of Ashland "to finance Beal's interest" (R. 443), and that Ashland would prepare the necessary instruments. (R. 391.) All of the subsequent correspondence between the parties shows that Ashland recognized that it had promised to finance Beal's interest and that it was the agreed responsibility of Ashland, and not of Beal, to prepare the financing agreement. (See the following letters of Ashland: Pl. Ex. 21, R. 237-38; Pl. Ex. 26, R. 250-51; Pl. Ex. 25, R. 247-48; Pl. Ex. 36, R. 279-80.)

Beal acted promptly in advising Ashland of his understanding of the financing agreement, and in requesting that Ashland proceed at once to fulfill its promise to prepare it. In the very letter of transmittal, dated May 23, 1951, in which the Operating Agreement, as finally executed and acknowledged, was sent to Ashland, he stated that it was to provide that "Ashland is to carry his share

of development and production expenses until payout," and that "when" this agreement, and the agreement for a call on his oil "have been prepared and executed I believe this deal will be wrapped up."

This letter, received by Ashland during the initial stages of the rapid and costly development program inaugurated by Ashland, clearly advised Ashland that Beal understood that the agreed financing arrangement was one "to carry" his interest without personal liability on his part, and wherein his share of the costs would be paid out of his share of the production. Marshall, Vice-President of Ashland, so admitted. (R. 459, 462-463.) Indeed, he stated that whoever was handling the details for Ashland "certainly ought to have tried to straighten it out *at that time.*" (R. 463-464.) He also admitted that Beal's letters to Marberry of July 5, 1951 (R. 240), and July 19, 1951 (R. 254-255), indicated that Beal "was thinking about a carried interest," and that Marberry should have discussed the matter with Beal if he had a different understanding. (R. 464-46.) (Emphasis added.)

But Beal went further than merely advising Ashland that he understood that Ashland was carrying his interest. He affirmatively called upon Ashland to advise him if its understanding was otherwise. In his letter of July 19, 1951, to Marberry (R. 254-255), he requested Marberry to "*verify*" his statement of the nature of the financing agreement with Marshall, adding, "If the above is not strictly in accordance with Mr. Marshall's understanding, *please advise.*" (Emphasis added.)

He was not so advised. His letter was not even answered.

In view of this specific request to verify his understanding of the agreement and to advise him if it was incorrect, Beal was clearly entitled to assume that Ashland's failure to reply indicated its approval of his understanding of the agreement. This is especially true since Ashland knew that Beal was waiting for Ashland to fulfill its promise to draft the agreement, and if it planned to draft a different kind of agreement, it should have promptly so advised Beal.

Ashland did not prepare the financing agreement which it had agreed to prepare, and there was no further correspondence between the parties until after all six wells had been completed and paid for by Ashland without any request for payment being made of Beal, and after the production had declined more than 50 per cent.

Finally, in its letter of May 22, 1952, Ashland stated that "at long last" it had gotten around to preparing an agreement covering the "advances" made to Beal. An ordinary installment promissory note and deed of trust was enclosed for Beal's signature.

The jury found in Special Issue Number 6 that Ashland "by its conduct led Carlton Beal to believe that such company had agreed to carry his one-fourth interest in the lease in question" (R. 571), and the United States District Court entered judgment for Beal. (R. 580-87.)

The United States Court of Appeals affirmed the judgment of the District Court (page 37 herein) and overruled Ashland's Motion for Rehearing.

ARGUMENT

Beal respectfully submits that the decision involved in this case can affect no one except the two parties involved. The decision turns only on the particular facts involved, and there are no important or special reasons why this Court should review the decision of the lower Courts.

The case has had careful consideration by both the District Court and the United States Court of Appeals. In the latter Court, both parties fully briefed the questions of law involved. After the opinion was handed down, Ashland filed a full brief on Motion for Rehearing, and the Court of Appeals requested a brief in reply from Beal so that the case would have the most careful consideration. The Motion for Rehearing was later overruled.

Due to the length of the Petition, Beal will attempt to show very briefly that the decisions of the lower Courts are correct and in complete accord with the Law of Texas, rather than attempt to answer each contention separately as was done in Reply to Motion for Rehearing.

I.

THE STATUTE OF FRAUDS

Ashland makes a desperate effort in its Petition to convince this Court that the estoppel issue in this case involves fundamental questions of Texas real property law, and that the Statute of Frauds, as construed by the state courts of Texas, did not authorize the Court of Appeals to invoke the doctrine of estoppel against enforcement by

Ashland of the payment provisions of the written agreement other than out of Beal's one-fourth share of the production.

Neither of these points is well taken. The estoppel issue in this case does not involve any conveyance of an interest in land, nor any contract to convey any interest in land. Nor does the estoppel imposed by the court prevent the enforcement of any contractual provision required to be in writing by the Statute of Frauds, nor result in any modification of the written agreement in a manner violative of the Statute of Frauds.

Let us look at the basic transaction involved. There is nothing unusual about the agreement made between Beal and Ashland. It was simply an agreement between two cotenants of an oil and gas leasehold estate having for its primary purpose the development of the commonly-owned lease. No transfer of any title, nor contract to convey any title in or to the existing lease is involved. Beal, as owner of an existing undivided one-fourth interest in the lease, simply agreed with his cotenant, Ashland, the owner of the other three-fourths, that Ashland would have the right to drill and operate the lease which they already owned in common and which they were to continue to own thereafter in common on the same undivided interest basis. Under Texas law each of the cotenants had a right to drill and develop the common properties, but independent development of a single lease by each cotenant is not satisfactory as a practical matter and it is desirable and cus-

tomary for them to agree that one of the cotenants will take charge of operations.

It cannot be successfully contended that operating agreements, as such, entered into between existing cotenants of an oil and gas lease, which merely provide for drilling and development of the common property, sharing in the production therefrom, and liability for expenses, come within any one of the five subdivisions of the Texas Statute of Frauds *(Art. 3995, Tex. Rev. Civ. Stats. 1925).* (Emphasis added.)

Nor do any of the basic provisions of the written operating agreement involved in this case require a writing for their validity. Indeed, there are only two minor and incidental provisions in the written agreement which can be said to come within the Texas Statute of Frauds. One of these is the preferential right of purchase agreement contained in paragraph 25(b), and the other is the lien provision contained in paragraph 10. All of the other provisions contained in the written agreement would have been valid under Texas law if they had been orally made.

The estoppel invoked in this case is not directed at either of the two provisions in the written agreement which involved the Texas Statute of Frauds. It is directed at the claimed right of Ashland to enforce the provisions in paragraph 8 (R. 22) of the operating agreement imposing personal liability on Beal to pay one-fourth of the drilling and operating expenses incurred by his cotenant, Ashland, in developing and operating the lease owned by them in common.

The Supreme Court of Texas in *Garcia v. Karam, 276 S. W. 2d 255* (decided March 2, 1955) said the following with respect to the Statute of Frauds and mere oral modifications of contracts:

> "Texas has not adopted the section of the Statute of Frauds relating to the transfer of personality, *neither has this state enacted a statute which prohibits a subsequent oral modification of a contract which is required by the Statute of Frauds to be in writing.*" (Emphasis ours.)

With respect to the specific issue before the Court it held:

> *"If neither the portion of the written contract affected by the subsequent modification nor the matter encompassed by the modification itself is required by the Statute of Frauds to be in writing, then the oral modification will not render the contract unenforceable.* (Emphasis ours.)
>
> * * * * *
>
> "It is well settled in Texas that the Statute of Frauds does not require that the consideration in a contract for the sale of realty be expressed in writing * * *. *The subject matter of the contract has not been changed but only the method of performing it* * * *. We hold that the subsequent oral modification of the written contract involved in this case is valid." (Emphasis ours.)

The particular provision in the Operating Agreement to which estoppel has been directed is Paragraph 8 (R. 22), which contains the *consideration* to be paid by Beal to his cotenant, Ashland, for drilling and developing the lease owned in common.

The above quoted rule by the Supreme Court of Texas applies if neither (1) the portion of the contract affected by the modification, nor (2) the matter encompassed by the modification is itself required by the Statute of Frauds to be in writing. As to the first requirement, it is clear that the payment provisions of Paragraph 8 of the Operating Agreement are not required to be in writing. Even in the case of a contract for the sale of land—which is expressly covered by the Statute—the Supreme Court of Texas has said that "the Statute of Frauds does not require that the consideration be expressed in writing." *Garcia v. Karam.* Certainly, then, the monetary consideration between the cotenants involved here is not required to be in writing. All of the terms and provisions of Paragraph 8 would have been valid if made orally, and the first requirement of *Garcia v. Karam* is satisfied.

Also, if a mere subsequent oral agreement modifying the payment provision would not be within the Statute, an estoppel by reason of subsequent conduct to enforce the payment provision would not raise the question of whether the grounds relied upon for estoppel were sufficient since the statute would not even be involved.

Furthermore, as stated in *Gulf Production Co. v. Continental Oil Co., 139 Tex. 183, 132 S. W. 2d 553, 164 S. W. 2d 488,* the following rule is well established in Texas:

> "That the parties to a contract, grant or option may lawfully change the medium of payment, and waive strict performance of the method of payment, without violating the Statute of Frauds."

That is all that has been done in this case. Instead of looking to Beal personally, Ashland must look to the income from Beal's share of the oil and gas.

The second requirement of *Garcia v. Karam*—that the matter encompassed by the modification is not of such a nature as to come within the statute—is likewise satisfied. The Court of Appeals has held that Ashland is estopped to deny that its agreement to finance Beal was in accordance with Beal's letter of July 19, 1951. (R. 254-55.) In the first place, the modification does not rest in parol but is found in a writing signed by Beal, and to which Ashland gave its implied assent by its failure to reply when it was under a duty to do so if the letter did not correctly state the existing agreement. *Burnett v. Atteberry, 105 Tex. 119, 145 S. W. 582.*

Ashland contends at pages 17 and 18 of the Petition that the provisions in the letter of July 19, 1951, whereby Beal said Ashland was to "retain 100% of proceeds from oil and gas production" to cover his share of the costs, and whereby Beal agreed to pledge "the income from my 25% working interest in the Beal-Russell #1 well" are contracts for "the sale or lease of realty" and contracts "on and for realty." As authority for these contentions Ashland cites various cases involving royalty conveyance, reserved royalties, and oil payments. These cases have absolutely no bearing on the question involved. As has been pointed out, no title passed between these cotenants. They already owned the lease jointly.

Ashland overlooks the key words in the letter—"proceeds" and "income." Beal does not purpose to convey an interest in the oil and gas in place. Until the oil and gas is severed and there are "proceeds" and "income" derived from it, Ashland has no rights in it.

As said by the Supreme Court of Texas in *Hager v. Stakes, 116 Tex. 453, 294 S. W. 835, 838:*

> "* * * parties may contract for the sale of oil as personalty, after its severance, and that such a contract is without the statute of frauds."

However, if these provisions of the letter were within the Statute, the Statute is certainly satisfied, for the letter constitutes a *memorandum in writing* of the promise or agreement involved. The Statute of Frauds, of course, is a personal defense and must and can be asserted only by the party to be charged—which is Beal. Ashland cannot do so for him. Obviously, Beal could not have successfully asserted the defense of Statute of Frauds in a suit brought by Ashland to enforce the provisions in that letter.

If the provisions of the Operating Agreement were all clearly within the Statute of Frauds, however, the law of Texas would not prevent the doctrine of equitable estoppel from being applied. In addition to the cases cited by the Court of Appeals in support of its decision on estoppel, the following Texas cases are of inportance.

In *Humble Oil & Refining Co. v. Harrison, 146 Tex. 216, 205 S. W. 2d 355,* Humble brought suit to remove the cloud on its title to an oil and gas leasehold estate caused

by Harrison's contention that its lease had terminated as to his undivided mineral interest because of Humble's failure to pay him his correct share of the delay rentals payable under the "unless" clause in the lease. The mineral deed from the landowners was ambiguous but the Court held that Harrison was entitled to receive $500 as his share of the annual rentals due on a 200-acre tract covered by the lease. In advance of the delay rental date Humble sent to the depository bank named in the lease the sum of $375, which was deposited to Harrison's account, and a deposit receipt therefor furnished Harrison by the bank. Harrison did not inform Humble of its mistake until after the rental date had passed, at which time he claimed that Humble's lease had terminated as to his undivided mineral interest. The Court held that Harrison had no right to remain silent under the circumstances, and that he was estopped to assert termination of the lease. In so holding, the Supreme Court of Texas stated:

> "Where, as in this case, the lessee has in good faith made a mistaken construction of the lessors' partial conveyance of their interests and lessee has made a payment in accordance with such construction, of which the assignee has notice, the duty rests on the assignee to notify the lessee of its mistake so that the lessee will have an opportunity to make a proper payment of the delay rentals. Where the assignee, instead of giving the lessee such notice, remains silent, we hold that the assignee is estopped to assert that the lease has terminated as to his interest on the ground that the lessee has failed to pay to him a sufficiently large share of the delay rentals.

"While we do not know of any case presenting the exact situation involved here, we think *the general principles of equitable estoppel are applicable.* In Burnett v. Atteberry, 105 Tex. 119, 145 S. W. 582, 587, this Court said:

> " 'An estoppel may arise as effectually from silence, where it is a duty to speak, as from words spoken. One may be induced to act to his injury on account of the silence of one interested in a transaction, and when such course of action is permitted with the knowledge of the interested party or induced by silence or tacit acqiescence, the doctrine of estoppel may be invoked.'

"See also Johnson v. Sovereign Camp, W. O. W., 125 Tex. 329, 83 S. W. 2d 605.

"We hold that Harrison is estopped to assert that Humble's lease has been terminated because of its failure to make sufficient payments of delay rentals to him." (Emphasis ours.)

It will be observed that the estoppel to assert termination of the lease in accordance with its written terms had the effect of re-vesting in Humble an oil and gas leasehold estate. However, neither the Statute of Frauds nor the Statute of Conveyances deterred the Texas Supreme Court from applying "the general principles of equitable estoppel" in this case.

Likewise, in *Mitchell v. Simms, 63 S. W. 2d 371 (Tex. Comm. App.)*, the acceptance of a late rental payment by a lessor of an oil and gas lease was held to estop him from claiming that the lease had terminated for non-payment on the rental date. As stated by the Court, "The practical

result of the estoppel which arose in December is the same as if Simms and wife had, by binding agreement in December, revived the lease." The fact that the lease had terminated by its terms did not prevent the Court from estopping the lessor to enforce that term provision in the written lease.

In *Gardner v. Platt, 68 S. W. 2d 297 (Tex. Civ. App., error refused)*, a conveyance of land provided that the failure of the grantees to pay any of the monthly installments provided for therein during the lifetimes of the grantors would authorize the grantors to forfeit the conveyance. The grantees claimed that this provision had been rescinded and abrogated by a subsequent parol agreement on the strength of which they had expended money in improving the property and in continuing to make payments to the grantors. The Court held that the grantors were estopped from asserting this written forfeiture provision. It quoted with approval the statement of Judge Gaines in *Morris v. Gaines, 82 Tex. 255, 17 S. W. 538, 539*, that:

> "The doctrine is well established that where either party, in reliance upon the verbal promise of the other, has been induced to do or to forbear to do any act, and thereby his position has been so changed for the worse that he would be defrauded by a failure to carry out the contract, equity will enforce a performance."

See also, *Burgin v. Godwin, 167 S. W. 2d 614 (Tex. Civ. App., no writ history)*, where the above statement by

Judge Gaines was applied in a situation involving a parol modification of an instrument required to be in writing.

In *Gardner v. Platt* the Court also stated and held:

> "And when the invocation of the statute of frauds as against an oral contract, subject thereto, would result in a fraud by grantors upon a grantee, *regardless of any deliberate intent or purpose to defraud*, a court of equity has power to grant relief. '*The statute of frauds does not stand in the way of the exercise of this equitable jurisdiction.*' Johnson v. Smith, 115 Tex. 200, 280, S. W. 158, 161, and cases there cited." (Emphasis ours.)

Only one other Texas case will be referred to. In *McDonald v. Whaley, 244 S. W. 596 (Tex. Comm. App.)*, there was involved a parol rescission of a contract for the conveyance of land which the Court held to be a type of contract within the Statute of Frauds. Nevertheless, the doctrine of estoppel was applied, the Court stating:

> "Though the parol contract of rescission be within the statute, yet if the defendant in error in reliance thereon has so far acted upon it that a failure to complete it according to its terms would work irreparable injury to him, equity will regard the case as removed from the influence of the statute, and grant the relief."
>
> * * * * *
>
> "The oral contract of rescission was, however, so far acted upon by the parties that it would be inequitable and unjust to hold defendant in error bound by the original contract."

Beal would point out to the Court that most, if not all, of the cases cited by Ashland involve executory contracts

for the sale of land, which have no bearing on the issue here involved.

Robertson v. Melton is one of these and is mainly relied upon by Ashland to support its contention that the Statute of Frauds prevents the application of estoppel. Contrary to Ashland's contention, that case definitely recognizes that the doctrine of estoppel could have been invoked if it had been supported by the pleadings and the evidence, and even though the estoppel was imposed against a particular provision which was within the Statute. The Court in *Robertson v. Melton* merely said:

> "We do not find either in the pleadings or in the evidence any grounds for sustaining the contention of defendant in error that plaintiff in error is estopped from claiming the benefit of the statute of frauds."

Clearly, under Texas law the doctrine of equitable estoppel will be applied in a proper case despite the fact that the effect of the estoppel may be to prevent the party estopped from relying upon the defense of the Statute of Frauds and even though it may preclude that person from enforcing some provision in a written instrument which is itself required to be in writing. Under the facts of this case, even if the Statute of Frauds was in any way involved, Ashland would be estopped to assert it as a defense.

II.

REPLY TO ADDITIONAL ARGUMENTS

Briefly replying to other arguments of Ashland, it is interesting to note at page 35 of the Petition, in arguing

the Parol Evidence Rule, that Ashland complains that "in violation of the Parol Evidence Rule * * * the Court of Appeals declared that Ashland had 'promised to draft the agreement to finance Beal' and it was upon this promise that the Court raised a duty to answer Beal's letter of July 19, 1951."

Bearing in mind that the Operating Agreement was dated April 8, 1951, and mailed to Ashland fully executed on May 23, 1951 (R. 223, 224), let us look at Ashland's own letters after that time to see if Ashland recognized that it had made such a promise.

1. June 18, 1951, letter from Crawford (Ashland) to Carpenter (Beal) in which reference is made to the May 23, 1951, letter containing the written condition of delivery. Reference is made to a loan agreement to be prepared. (Rec. 237-38.)

2. July 9, 1951, letter from Crawford to Carpenter, stating that Crawford will prepare the loan agreement and inquiring as to terms. The call on Beal's oil is also mentioned, and the letter concludes: "As soon as I have your reaction to these suggestions, *I shall proceed to have the papers prepared.*" (R. 250-251.)

3. July 13, 1951, letter from Marberry (Ashland) to Beal in which reference is made to the financing arrangement and which concludes: "*Pending completion of this deal,* I am retaining the copy of the division order which you forwarded to us, in this office." (R. 247-48.)

4. May 22, 1952, letter from Crawford to Rachal (attorney for Beal) sending loan instruments for Beal's execution. (R. 279.)

Need more be said?

Beal does not seek to recover on the oral agreement made between him and Marshall before the Operating Agreement was executed. Beal has invoked the equitable doctrine of estoppel because of the conduct *subsequent* to the execution of the written agreement, including Ashland's silence, as shown by the correspondence of both Beal and Ashland. It is upon this ground that the Court of Appeals has applied estoppel. The Parol Evidence Rule applies only to prior and contemporaneous negotiations. It does not apply to subsequent agreements entered into by the parties. *Garcia v. Karam, Supreme Court of Texas, 276 S. W. 2d 255.*

By the same token, it should not apply to subsequent conduct of the parties. Especially so where the letters of Ashland recognize the duty to prepare the financing agreement.

The Court of Appeals has also correctly held that if Ashland planned to draft an agreement differing from Beals' written understanding, it should have so advised him after receiving his letter of July 19, 1951 (R. 254-55).

Ashland did not just fail to answer *a* letter, as the caption of its argument on page 39 states. It failed to answer three letters in which Beal or his agent set out Beal's understanding of the forthcoming agreement. (Pl. Ex. 15, R. 223-24; Pl. Ex. 23, R. 240-41; Pl. Ex. 28, R. 254-55.)

The letter of July 19, 1951 (R. 254-255), which Ashland calls "uninvited," "unaccepted" and "self-serving,"

after stating for the third time what Beal's understanding was, says:

> "Would you kindly verify the above with him (Marshall) and prepare the financing agreement accordingly. If the above is not strictly in accordance with Mr. Marshall's understanding, PLEASE ADVISE." (R. 254-55.) (Emphasis added.)

It is hard to imagine a more applicable fact situation for the following language from *Burnett v. Atteberry, 105 Tex. 119, 145 S. W. 582, 587:*

> "Estoppel by silence arises where a person, who by force or circumstances is under a duty to another to speak, refrains from doing so and thereby leads the other to believe in the existence of a state of facts in reliance upon which he acts to his prejudice'."

Under the Incomplete Contract Argument, Ashland again misuses Special Issue Number 7. As heretofore pointed out, that issue in its own terms (R. 572) refers to a time prior to the Operating Agreement and does not have any bearing on the later financing agreement.

This argument is but another instance of Ashland's attempt to profit by its own failure to prepare the financing agreement as it indicated it would in its own four letters (Pl. Ex. 21, R. 237-38; Pl. Ex. 26, R. 250-51; Pl. Ex. 25, R. 247-48; Pl. Ex. 36, R. 279-80), and but points up Ashland's inequitable position.

Finally, the charge of the District Court was proper, as shown by a complete reading of it (R. 520-28) and this Reply will be unduly lengthened by a discussion of its propriety.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

D. L. Case

D. L. CASE,
2800 Republic Bank Bldg.,
Dallas, Texas.

A. W. Walker, Jr.

A. W. WALKER, JR.,
2800 Republic Bank Bldg.,
Dallas, Texas,

Of Counsel:
ROBERTSON, JACKSON, PAYNE,
LANCASTER & WALKER.

I, A. W. Walker, Jr., one of the counsel of record for Respondent, certify that on the 31 day of January, 1956, a true and correct copy of the foregoing Brief for Respondent in Opposition was duly served upon counsel of record for Petitioner, Mr. W. B. Browder, Jr., at P. O. Box. 670, Midland, Texas, by depositing the same in a United States Post Office with first class postage prepaid.

A. W. Walker, Jr.

A. W. WALKER, JR.

APPENDIX A

No. 15316

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

ASHLAND OIL & REFINING COMPANY,
Appellant,

versus

CARLTON BEAL,
Appellee.

Appeal from the United States District Court for the Western District of Texas

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(July 22, 1955.)

Before RIVES, Circuit Judge, and DAWKINS and DeVANE, District Judges.

RIVES, Circuit Judge: The principal issue is whether appellee Beal is personally liable for one fourth of the cost of drilling, developing and operating on 237.33 acres of the Elser oil and gas lease in Upton County, Texas, owned by Beal and Ashland in the proportions of one-fourth and three-fourths, respectively. The Elser lease secured by Beal on December 9, 1950, was on a total of 27.33 acres

of land, but the Beal-Russell No. 1 well had been drilled on 40 acres in the northeast corner thereof prior to the transactions here involved. Beal had executed division orders to Ashland covering Beal's share of the oil from that well and from fourteen more producing leases other than the Elser lease.

Beal brought this suit to recover the value of his share of the oil produced from the Beal-Russell No. 1 well and from said fourteen other producing leases which was being withheld by Ashland. Ashland defended, claiming that it had rightfully withheld all such amounts, and also filed its counterclaim against Beal for one-fourth of the costs and expenses incurred in drilling, developing and operating on 237.33 acres of the Elser lease under the terms of a written operating agreement between Beal and Ashland, dated as of the 8th day of April, 1951, which Ashland claims to be the contract between the parties. Answering Ashland's counterclaim, Beal pleaded substantially four defenses, which for convenience of discussion we re-arrange in the order following.

First: Conceding arguendo that the written operating agreement controlled, Beal said that Ashland had failed to give Beal notice of its intention to drill the wells on said leasehold with the result under the terms of said agreement that Beal would be considered as having elected not to participate in the cost of the wells.

Second: The operating agreement never became effective because it was delivered on a written condition which has not been fulfilled.

Third: The operating agreement was executed as a result of mutual mistake.

Fourth: Ashland is estopped from now seeking to hold Beal personally liable.

The case was tried to a jury without distinction as to which of the issues were submitted to the jury as a matter of right, and as to which the jury's verdict was merely advisory. See Rule 39, F. R. C. P. Evidence of oral conversations and letters preceding the written agreement were freely admitted by the court, Ashland reserving exceptions thereto. A number of exceptions were also reserved to the court's charge to the jury. The jury returned its verdict on special issues as set forth in the margin.[1]

[1] "1. That Ashland Oil & Refining Company orally agreed with Carlton Beal that Ashland Oil & Refining Company would carry the one-fourth working interest of Carlton Beal in the lease in question without any personal liability on his part.
"Answer 'Yes' or 'No.'
"Answer: Yes.
"2. That Ashland Oil & Refining Company orally agreed with Carlton Beal that Ashland Oil & Refining Company would carry the one-fourth working interest of Carlton Beal in the lease in question and, Ashland Oil & Refining Company in its purchase of the 8⅝ inch casing used on the lease, orally agreed to then pay Carlton Beal $4,526.83 for his one-fourth interest in such casing and carry the amount as a part of the development costs.
"Answer 'Yes' or 'No.'
"Answer: Yes.
"3. That the lease, assignments, net profits agreement and written operating agreement bearing date of April 8th, 1951, were the agreements between the parties with respect to the payment of developing and operating costs incurred on Carlton Beal's one-fourth working interest on the lease in question.
"Answer 'Yes' or 'No.'
"Answer: No.
"4. That the written operating agreement bearing date April 8th, 1951, was delivered by Carlton Beal on condition that his working interest in the lease in question was to be carried by Ashland Oil & Refining Company and such agreement to carry would be reduced to writing at a later date and be signed by the parties.
"Answer 'It was' or 'It was not.'
"Answer: Yes.
"5. That the written operating agreement bearing date April 8th, 1951 was signed and delivered by the parties thereto as the result of a mutual mistake as to the method of payment by Carlton Beal to Ashland Oil &
(Footnote continued on p. 26.)

Each party moved for judgment. The court entered judgment for Beal against Ashland in the sum of $62,473.34 and interest thereon from July 1, 1954; that Ashland take nothing by its cross-action; and that the operating agreement be reformed as prayed by Beal.

First: Relating to what we have designated as Beal's first defense to Ashland's counterclaim, the court submitted to the jury special issues 10, 11 and 12, which the jury answered faborably to Ashland. While there was no evidence that Ashland gave Beal the formal kind of notice called for in the operating agreement, it appeared without conflict that notices of the proposed locations and the drilling program were sent to Beal both by the Railroad Commission and by Ashland, and that Beal, in a number of letters to Ashland, discussed the drilling of these wells in a manner which showed that he considered himself as a working partner therein. We agree with the jury, there-

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(Footnote continued from p. 25.)
Refining Company of one-fourth of the developing and operating costs and that the actual agreement of the parties controlling such payments was otherwise than as set out in the operating agreement bearing date April 8th, 1951.

"Answer 'Yes' or 'No.'

"Answer: Yes.

"6. That Ashland Oil & Refining Company by its conduct led Carlton Beal to believe that such company had agreed to carry his one-fourth interest in the lease in question.

"Answer 'Yes' or 'No.'

"Answer: Yes.

"7. Do you find from a preponderance of the evidence that at the time of the telephone conversation or conversations between Carlton Beal and C. H. Marshall, for Ashland Oil & Refining Company, and the subsequent conversations between C. H. Marshall, for Ashland Oil & Refining Company, and R. D. Carpenter for Carlton Beal, it was the intention or in the contemplation of the parties that before there was any contract the terms thereof should be reduced to writing and signed by the parties.

"Answer 'It was their intention that the contract be reduced to writing' or 'It was not their intention that the contract be reduced to writing.'

"Answer: It was their intention that it be reduced to writing.

"8. Do you find from a preponderance of the evidence that it was a part of the agreement between Carlton Beal and R. D. Carpenter on

(Footnote continued on p. 27.)

fore, that Beal's first defense to Ashland's counterclaim was not sustained.

Second: The facts with reference to Beal's second defense to Ashland's counterclaim, conditional delivery of the written agreement, must be briefly reviewed. Two copies of the operating agreement appear to have been signed by Beal on April 8, 1951. These were forwarded to Ashland by a letter dated April 11, 1951, stating that "it is understood that your company will execute the same and return one copy to this office," and further calling

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(Footnote continued from p. 26.)
the one hand, and C. H. Marshall and John Crawford for Ashland Oil & Refining Company on the other hand, that Ashland should have a call on Beal's oil for five (5) years?

"Answer 'Yes' or 'No.'

"Answer: Yes.

"9. Do you find from a preponderance of the evidence that it was a part of the agreement between Carlton Beal and R. D. Carpenter on the one hand, and C. H. Marshall and John Crawford for Ashland Oil & Refining Company on the other hand, that Beal would secure payment of his part of the drilling and operating costs of the Elser Lease by a mortgage on Beal's interest in the Beal-Russell No. 1 well?

"Answer 'Yes' or 'No.'

"Answer: No.

"10. Do you find from a preponderance of the evidence that on or before July 25, 1951, Ashland Oil & Refining Company gave Carlton Beal notice of its intention to proceed to drill five (5) wells on the Elser Lease in addition to those two (2) wells already completed on said lease?

"Answer 'Yes' or 'No.'

"Answer: Yes.

"11. That Ashland Oil & Refining Company notified Carlton Beal of its intention to drill each additional well after Well No. 1, and notified Carlton Beal of the estimated cost of each such well, all in advance of the commencement date of each such additional well.

"Answer 'It gave notice,' or 'It gave notice on wells numbers (numbering them) 2, 3, 4, 5, 6.'

"Answer: Yes it gave notice.

"12. If you answer 'yes' to the foregoing paragraph 11 of your verdict, and only in that event, then answer:

"That Carlton Beal did or did not within fifteen days after he was notified of Ashland Oil & Refining Company's intention to drill additional wells being notified of the additional costs of each such well after Well No. 1, agree in writing that he, Carlton Beal, would personally participate in the drilling and operating costs of each such additional well.

"Answer 'He did not agree on any well' or 'He did agree on wells numbers (numbering them) 2, 3, 4, 5, 6.'

"Answer: Yes he did agree."

attention that Exhibit A, describing the lease affecting the joint properties, had not been filled in and giving the information from which it could be filled in. Ashland returned the two copies which Beal had signed, together with two additional copies, by a letter dated May 17, 1951, in which it was stated that all four copies had been signed and acknowledged by Ashland, and in which it was requested that Beal acknowledge the two copies he had originally signed, and sign and acknowledge one additional copy, and return these three copies to Ashland. Beal complied with this request and forwarded the three executed and acknowledged copies to Ashland along with a letter dated May 23, 1951, from Beal's employee, Carpenter, to Ashland's employee, Crawford,[2] which forms the basis for

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[2]

"Carlton Beal
"11699 Bellagio Road
"Los Angeles, 49
"May 23, 1951

"Mr. John L. Crawford,
215 Crawford Hotel,
Midland, Texas.

"Dear John:

"Complying with your letter of May 17, 1951, we are transmitting herewith three executed and acknowledged copies of Operating Agreement dated April 8, 1951, between Ashland Oil & Refining Company and Carlton Beal.

"It is my recollection that you are going to prepare Development Loan Agreement between Ashland and Carlton providing that Ashland is to carry his share of development and production expenses until payout. Carlton advises me that in accordance with his conversation with Cob Marshall this Loan Agreement would cover six Spraberry wells on the Elser lease at 4 to 4½% interest payable out of 80% of 25% of the working interest gross revenue. I further recall that this Development Loan Agreement or a separate letter agreement was to be prepared covering Ashland's call on Carlton's share of the oil. In this instance there was to be a provision that Ashland would have a call on said oil for five years and thereafter until bona fide sale of Carlton's interest.

"When the above papers have been prepared and executed I believe this deal will be wrapped up.

"My best regards,

"(S.) DICK,
R. D. CARPENTER."

Beal's claim of conditional delivery of the operating agreement.

Peculiar significance is attached to the word "carry" as used in that letter (footnote 2). From the testimony of a number of oil operators, it seems to be established that in oil field terminology the term "carried interest" means an interest that pays no part of the initial development except out of the oil and gas produced, though the detailed terms of such an interest would have to be fixed by agreement.[3] Beal testified that he expected such details to be worked out in a written agreement, but that that was never done. Ashland freely concedes that an oral understanding existed by virtue of which it was to finance Beal and that Ashland was later to submit the necessary papers for that purpose, but it denies any intention to "carry" Beal in the sense that he would not be personally liable for his proportionate share of the cost of development. Its agent who received the letter (footnote 2) testified that, if the term "carried interest" had been used, he would have understood the letter in the sense to which Beal testified, but that, "* * * there is a big difference in my mind between 'to carry' and to own a carried interest," and that that letter did not give him the information that Beal thought that he would have no personal liability.

[3]For example, whether the operator, that is the party who is putting up the cost of development, has control of the oil and the right to sell it or the carried party can sell his part of the oil; whether the carried interest is to be carried for the initial development phase only of the operation or for the life of the lease; whether interest is to be charged and, if so, the rate; who would own the equipment, such as pipe, motors and pumps, if and when production ceased; and other detailed terms.

Beal argues that the last sentence in the letter, "When the above papers have been prepared and executed I believe this deal will be wrapped up," made the preparation and execution of the loan agreement a condition precedent to the effectiveness of the operating agreement. There is a serious question as to whether the operating agreement had not been unconditionally delivered and made effective prior to the letter (footnote 2); but assuming arguendo that it had not, it seems to us far fetched to claim that that letter attached a condition precedent to the operating agreement becoming effective. Clearly, we think, that was not Beal's intention for he has himself throughout depended on the operating agreement in other respects. For example, he billed Ashland for engineering work which he had done on the Elser lease pursuant to Ashland's commitment in the operating agreement to pay therefor; he sold certain pipe to Ashland, and sent Ashland a bill "because they (Ashland) had agreed in this operating agreement to pay all expenses within a certain time and that was one of the expenses." Both on direct and on cross-examination, Beal testified that it was his contention that portions of the operating agreement are effective and that he relied upon portions of that agreement.

The conclusion to which Beal's contention of conditional delivery leads is thus expressed in his counsel's brief: "Since Ashland exercised its legal right as a cotenant to drill and operate the lease without any contract with its cotenant, Beal, it is not entitled to hold him personally liable for the drilling and operating costs incurred by it,

but is merely entitled to recover Beal's one-fourth of those costs out of Beal's one-fourth share of the production." We do not understand that the district court in rendering its judgment proceeded on any such theory, for it actually ordered the operating agreement as an existing contract to be reformed to express what it considered to be the intention of the parties. There was no substantial evidence, we think, to sustain the contention that the written operating agreement never became effective because delivered on a written condition which has not been fulfilled.

Third: Beal's third defense to Ashland's counterclaim, that the operating agreement was executed as a result of mutual mistake, was evidently that adopted by the district court in rendering its judgment. It does appear practically without dispute that there was some verbal understanding, which Ashland was later to reduce to writing, under which Ashland was to finance Beal's share of the cost of development, but the evidence is in sharp conflict as to whether that understanding went to the extent that Beal was to have no personal liability and that Ashland was to be repaid only out of the oil and gas produced from the leasehold. There was substantial evidence to support the jury's verdict on the first issue submitted (footnote 1, *supra*), that Ashland orally agreed to "carry" the one-fourth working interest of Beal without any personal liability on his part.

That, however, is not enough to authorize the reformation of the written operating agreement for mutual mis-

take. It must further appear that there was a mutual mistake as to the contents or effect of the written agreement itself. *Tunnell v. Neill, 33 S. W. 2d 530, 533; Long v. Humble Oil & Refining Co., 154 S. W. 2d 925; Sun Oil Co. v. Bennett, 84 S. W. 2d 447; Henning v. Jefferson Standard Life Ins. Co., 129 F. 2d 224; 2 Pomeroy's Equity Jurisprudence, 4th ed., Sec. 854.* There could be no mistake as to the effect of the written agreement in merging all prior verbal negotiations and understandings, for that is the law under which all parties must operate and which must certainly have been in fact understood by these parties who had vast business experience in large affairs. Nor was there any mistake as to the contents of the written operating agreement, for Beal himself testified that he read it, submitted it to his attorneys, and that he and his lawyers and tax consultant knew what he was doing. Indeed, Beal's counsel concedes in brief:

> "* * * it appears that both Ashland and Beal knew that the provisions with reference to Beal's paying monthly one-fourth of the developing and operating costs were physically incorporated in the Operating Agreement, * * *."

The district court erred, therefore, in reforming the written operating agreement.

Fourth: On Beal's fourth defense to Ashland's counterclaim, the jury in answer to Special Issue No. 6 found

that Ashland by its conduct led Beal to believe that Ashland had agreed to "carry" his one-fourth interest in the lease (footnote 1, *supra*). As has been stated, Ashland admits that it had some understanding that it would finance Beal and that Ashland would prepare the necessary papers. Beal followed up his letter of May 23, 1951 (footnote 2, *supra*) with a letter of July 5, 1951, saying:

> "This is to remind you and make a matter of record a certain agreement that I have with Ashland Refining Company wherein Ashland is paying all the drilling costs of which my share is 25%. I am to pay my share of these drilling costs out of the production after taking out production costs.
>
> "I would like to know from you how this is to be handled; whether you are to make the payments for oil sales to me and I am to return the check to the Ashland to apply to my account to pay out my share of the drilling costs.
>
> "I would appreciate hearing from you about this matter."

Under date of July 13, 1951, Ashland responded:

> "In reply to your letter dated July 5, 1951, please be advised, that John L. Crawford, of our Midland, Texas office, has informed me that he has been corresponding with your Dick Carpenter, with regard to a financing arrangement covering your interest in the subject lease, and also, your #1 Beal-Russell lease, which agreement will prove that all, or a portion of your interest be paid to Ashland Oil & Refining Company, until your proportionate part of the drilling costs have been recovered."

Beal's reply to that letter is of such importance that we copy it in full in the margin.[4] Beal's letter of July 19, 1951 (footnote 4, *supra*) was never answered. The record does not reveal any further correspondence between the parties with respect to the financing of Beal's interest until some ten months later. Meanwhile, production from the

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[4] "July 19, 1951

"Ashland Oil and Refining Company
621 Apco Tower
Oklahoma City 2, Oklahoma

"Attention: Mr. Harry C. Marberry
"Re: Ashland Oil and Refining Company Beal-Russell (Elser) #1—Your No. 2025

"Gentlemen:

"Replying to your letter of July 13, 1951, please be advised that in January of this year Mr. R. D. Carpenter of this office met with your Mr. C. H. Marshall in Midland at which time the Elser Lease, Upton County, Texas was negotiated to your company.

"It was the desire of the undersigned that your company finance my 25% working interest in the wells to be drilled on the Elser Lease, both as to drilling and production costs, and it was agreed that your company was to retain 100% of proceeds from oil and gas production until the aforesaid costs, plus 4½% interest per annum were recovered. At the time Mr. Marshall and Mr. Carpenter were discussing the matter there was only one producing well on the subject lease. Understandably Mr. Marshall stated that your Company's policy was to require additional collateral, so that in event a dry hole or dry holes were drilled on the Elser Lease Ashland would not have an unduly long payout period.

"Mr. Carpenter then agreed with Mr. Marshall that the income from my 25% working interest (¼ of ⅝ of ⅝) in the Beal-Russell #1 well would be pledged as additional security to apply when and if a dry hole were drilled on the property. The Elser wells were to stand on their own unless a dry hole were drilled on the Elser Lease, at which time my income from the Beal-Russell #1 well would go to Ashland until drilling and production costs plus interest on the Elser wells had been recovered. It was not contemplated that my Beal-Russell #1 income would go to Ashland from the beginning of Ashland's operation on the Elser Lease, however.

"I believe the above outlines our understanding made with Mr. Marshall. Would you kindly verify the above with him and prepare the financing agreement accordingly. If the above is not strictly in accordance with Mr. Marshall's understanding, please advise.

"Very truly yours,
CARLTON BEAL.

"CB/cmj
"cc: Mr. C. H. Marshall
Mr. John L. Crawford
Mr. Hal Rachal"

lease had decreased more than fifty per cent. It was not until May 22, 1952, that Ashland wrote stating:

> "At long last I have prepared and submit for your approval a mortgage and note from Carlton Beal, in favor of Ashland Oil & Refining Company covering the advances made to Mr. Beal in the development and operation of the Elser Lease."

Enclosed was an installment promissory note and a deed of trust for Beal's execution. Beal refused to execute the note and deed of trust and wrote Ashland on June 2, 1952, that the instruments submitted were not in accordance with their agreement.

At the time Ashland received Beal's letter of July 19, 1951 (footnote 4, *supra*), the drilling of wells numbered 2, 4 and 6 had not been commenced. Under the operating agreement, Beal had a right to elect not to participate in the drilling of those wells. If Ashland had replied to Beal's letter of July 19, 1951, that its understanding of their agreement was not as therein outlined by Beal, it may be that Beal by outside arrangements could have avoided all or a part of the large personal liability to which he was and would be subjected under the terms of the operating agreement. The sharp decrease in gross production from the field did not come until the following April.

Ashland urges that its failure to answer Beal's letter cannot be treated as an admission, citing *Texas Co. of Mexico, S. A. v. Roos, 5th Cir., 43 F. 2d. 1, 14; Leach & Co. v. Pierson, 275 U. S. 120; Aetna Life Ins. Co. v. Kepler, 8th Cir., 116 F. 2d 1; Throckmorton v. St. Louis-San*

Francisco Ry. Co., 8th Cir., 179 F. 2d 165; and *McCormick & Ray, Texas Law of Evidence, Sec. 504, p. 653.* With this we would agree if Ashland were under no duty to reply. Ashland had, however, promised to draft the agreement to finance Beal, and it had failed to do so. It knew that Beal was waiting for it to fulfill its promise to draft that agreement, and if it planned to draft an agreement differing from Beal's understanding, it should have promptly so advised him, especially in view of Beal's request to that effect (footnote 4, *supra*).

Silence alone, where there is a duty to speak, may create an estoppel. As recognized by the Supreme Court of Texas in *Johnson v. Sovereign Camp, W. O. W., 125 Tex. 329, 83 S. W. 2d 605, 609;* "'From pure but misleading silence, coupled with a duty to speak, an estoppel will arise.' *Bigelow on Estoppel, 565.*" Likewise, the same Court in *Burnett v. Atteberry, 105 Tex. 119, 145 S. W. 582, 587,* stated:

> "The principle (estoppel) is an important one in the administration of the law. It not infrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. * * *
>
> "'Estoppel by silence arises where a person, who by force of circumstances is under a duty to another to speak, refrains from doing so and thereby leads the other to believe in the existence of a state of facts in reliance upon which he acts to his prejudice'."

See also, *Commercial Nat. Bank v. Nacogdoches Compress and W. Co., 133 Fed. 501.*

We think that Beal was clearly entitled to assume that Ashland's failure to reply to his letter of July 19, 1951 (footnote 4, *supra*) indicated its approval of his understanding of the agreement to finance, and that Ashland is now estopped to deny that the terms outlined in that letter constituted the financing agreement between the parties.

The judgment is, therefore, modified so as to eliminate that part reforming the written operating agreement dated April 8, 1951, and in lieu thereof to provide that Ashland is estopped to deny that its agreement to finance Beal is in accordance with Beal's letter of July 19, 1951 (footnote 4, *supra*), and, as so modified, the judgment is affirmed.

MODIFIED AND AFFIRMED.